

**REPUBLIC OF NAMIBIA**

**NATIONAL ASSEMBLY**

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**PUBLIC ENTERPRISES  
GOVERNANCE BILL**

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*(As read a First Time)*

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*(Introduced by the Minister of Public Enterprises)*

**[B. 15 - 2018]**

## BILL

**To make provision for the efficient governance of public enterprises and the monitoring of their performance; to make provision for the restructuring of public enterprises; to provide for the powers and functions of the Minister of Public Enterprises; and to make provision for incidental matters.**

### ARRANGEMENT OF SECTIONS

#### CHAPTER 1 PRELIMINARY PROVISIONS

1. Definitions
2. Declaration of public enterprises
3. Application of Act to bodies that are not public enterprises
4. Functions and powers of Minister
5. Confidentiality of information

#### CHAPTER 2 APPOINTMENT OF MEMBERS OF BOARD

6. Application of this Chapter
7. Limit on number of appointments on boards of public enterprises
8. Procedure for appointment on board of non-commercial public enterprise or extra-budgetary fund
9. Procedure for appointment on board of commercial public enterprise
10. Temporary board members

#### CHAPTER 3 GOVERNANCE OF PUBLIC ENTERPRISES

11. Governance agreement with board
12. Performance agreements with board members individually
13. Integrated strategic business plan
14. Annual business and financial plan
15. Approval of annual budget of public enterprise
16. General provisions relating to business plans and budget
17. Performance agreements of management staff of public enterprises
18. Remuneration of board members and management staff of public enterprises
19. Minister to be notified of significant affecting events
20. Duty to furnish information
21. Dividends
22. Annual reports of public enterprises
23. Investment policies
24. Obligations concerning subsidiaries

#### CHAPTER 4 SPECIAL INVESTIGATIONS

25. Power to direct special investigation
26. Appointment of special investigator
27. Powers of special investigator

- 
28. Publication
  29. Reports
  30. Expenses of special investigation
  31. Offences in relation to special investigation

CHAPTER 5  
RESTRUCTURING OF PUBLIC ENTERPRISES

32. Provisional identification of public enterprise for restructuring
33. Proposal for restructuring
34. Consultation
35. Interim measures
36. Determination of restructuring
37. Information and reports

CHAPTER 7  
GENERAL PROVISIONS

38. Regulations
39. Limitation of liability
40. Exemptions
41. Provisions of this Act prevail
42. Repeal of laws and savings
43. Short title and commencement

Schedule

**BE IT ENACTED**, as passed by the Parliament, and assented to by the President, of the Republic of Namibia, as follows:

CHAPTER 1  
PRELIMINARY PROVISIONS

**Definitions**

1. (1) In this Act, unless the context indicates otherwise -

“board”, in relation to a public enterprise, means the board of directors or other governing body of the public 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 public 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 public enterprise for the conduct of the business of the public enterprise;

“Companies Act” means the Companies Act, 2004 (Act No. 28 of 2004);

“commercial public enterprise” means a public enterprise specified to be a commercial public enterprise under section 2(2)(a);

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

“establishing law or document” means, in respect of -

- (a) a body established by a law, that law;
- (b) a company, means its memorandum and articles; and
- (c) in relation to a public enterprise which is an unincorporated business, means the constitution, contract or other document under which the business was established and exists,

and in respect of a body established by a combination of documents referred to in paragraphs (a), (b) and (c), such documents read together;

“executive member”, in relation to the board of a public enterprise, means a member of the board who is in the full time employ or employment of the public enterprise;

“extra-budgetary fund” means a public enterprise specified to be an extra-budgetary fund under section 2(2)(b);

“Minister” means the Minister responsible for public enterprises;

“Ministry” means the Ministry responsible for public enterprises;

“non-commercial public enterprise” means a public enterprise specified to be a non-commercial public enterprise under section 2(2)(c);

“relevant Minister” means -

- (a) in respect of a non-commercial public enterprise -
  - (i) that is created by a law, means the Minister responsible for the administration of the law governing the establishment and functions of the public enterprise; and
  - (ii) that is not created by a law, the Minister responsible for the matters for which the public enterprise was established;
- (b) in respect of a commercial public enterprise, means the Minister; and
- (c) in respect of an extra-budgetary fund, means the Minister responsible for Finance;

“prescribe” means prescribe by regulation;

“public enterprise” means a body declared under section 2(1) to be a public enterprise;

“staff member” means a staff member as defined in section 1 of the Public Service Act, 1995 (Act No. 13 of 1995);

“state-owned company” means a company in which the State is the sole or majority shareholder or a company created pursuant to the provisions of a law in order to fulfil a public or regulatory function; and

“this Act” includes any regulation made under section 38.

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(2) In this Act, any reference to the appointment of a member of a board is construed, unless the context indicates otherwise, to also refer to the appointment of an alternate member.

- (3) For the purposes of this Act -
- (a) the question whether a body corporate is a subsidiary of any public enterprise which is not a company, must be determined in the same manner as the question would be determined under the Companies Act if the public 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.

### **Declaration of public enterprises**

2. (1) The Minister may after consultation with Cabinet by notice in the *Gazette* declare -

- (a) any board, corporation, council, fund, trust or other body established as a body corporate by or under an Act of Parliament for performing functions prescribed by that Act or any other law;
- (b) any unincorporated business in which the State owns half or more of the interest; and
- (c) any state-owned company,

to be a public enterprise.

- (2) In the notice referred to in subsection (1) the Minister must -
- (a) if he or she is of the opinion that the board, corporation, council, fund, trust, body, business or company -
    - (i) provides a product or renders a service;
    - (ii) is capable of making a sustained profit; and
    - (iii) does not perform a regulatory function or administers a fund in the public interest,

specify that it is a commercial public enterprise;

- (b) if he or she is of the opinion that the board, corporation, council, fund, trust, body, business or company -
  - (i) was established to administer, allocate or utilise funds intended for a specific purpose; and
  - (ii) those funds are obtained from moneys appropriated by Parliament or obtained from a levy imposed for the purpose referred to in subparagraph (i),

specify that it is an extra-budgetary fund;

- (c) if he or she is of the opinion that the board, corporation, council, fund, trust, body, business or company does not comply with either paragraph (a) or paragraph (b), specify that it is a non-commercial public enterprise.

(3) In the notice referred to in subsection (1) the Minister may also specify that the public enterprise belongs to a specific prescribed subcategory of the categories referred to in subsection (2).

(4) The Minister may by notice in the *Gazette* determine that a body ceases to be a public enterprise and after such declaration any determination under section 4(2) is deemed to have been withdrawn and the provisions of the establishing law or document apply.

### **Application of Act to bodies that are not public enterprises**

3. The Minister may by notice in the *Gazette* declare any provision of this Act to apply to any board, committee, fund or any other institution purporting to perform any function under any law, if such institution has acquired or administers money that does not form part of the Central Revenue Fund whether such acquisition or power has been granted lawfully or not: Provided that this section does not apply to a local authority or regional council.

### **Functions and powers of Minister**

4. (1) Subject to this Act, the functions of the Minister are -
- (a) to make determinations referred to in subsection (2);
  - (b) to establish generally accepted common principles of corporate governance and good practice governing public enterprises;
  - (c) to develop common policy frameworks for the operations of public enterprises, including policy on issues relating to human resources, assets and finance;
  - (d) to determine criteria for the performance measurement and evaluation of public enterprises, and develop appropriate means for monitoring their performance;
  - (e) to lay down directives in relation to -
    - (i) governance agreements to be entered into by a relevant Minister with the board of a public enterprise;
    - (ii) performance agreements to be entered into between a relevant Minister and the individual members of a board of a public 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 and other senior management staff of public enterprises;

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- (iv) benefits for employees of public enterprises generally;
  - (v) the classes of contracts entered into by a public enterprise (including joint ventures, acquisition of other businesses and agreements relating to the corporate structure of a partner of a public enterprise) that may only be concluded after consultation with the relevant Minister, the Minister or the Minister responsible for Finance;
- (f) advise relevant Ministers on the appointment of such members in accordance with sections 8 and 9;
  - (g) to advise a relevant Minister on the removal of any member of a board from office in accordance with, and on any ground provided for in, its establishing law or 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;
  - (h) to furnish a relevant Minister with any comments he or she may wish to make in relation to an integrated strategic business plan, annual financial and business plan or annual budget of a public enterprise submitted to that Minister for approval and provided to the relevant Minister for information and comment;
  - (i) to facilitate the provision of programmes for the training and development of members of the boards and management staff of public enterprises on corporate governance and efficient management practices;
  - (j) to receive and consider for approval submissions made by public enterprises on the annual distribution of profits and the declaration of dividends in terms of section 21;
  - (k) to submit to Cabinet for decision any proposed restructuring plan prepared and approved by the Minister under Chapter 4 in relation to any public enterprise identified by Cabinet for restructuring; and
  - (l) to perform any other function entrusted to the Minister by or under this Act or any other law.
- (2) Despite the provisions of any other law, the Minister has the power to determine, after consultation with Cabinet -
- (a) the number of board members to be appointed within the limits of 5 to 7 persons, or such larger number as the Minister may consider appropriate in a particular case;
  - (b) to determine the number of persons to be appointed as executive members, if any;
  - (c) to determine that alternate members must be appointed;
  - (d) to determine the requisite qualifications, experience or skills of persons to be eligible for appointment as members of the board;

- (e) 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;
- (f) when the establishing law or document provides, that a certain number of members forms a quorum, must support a resolution, may call a meeting, or must or may perform a similar action, to determine a different number: Provided that the ratio between the number determined under this paragraph and the number determined under paragraph (a) must be as close as possible in the same ratio to each other as the ratio of the number in question to the total number of members in the establishing law or document.

(3) Subsection (2) is not applicable in relation to a company in which any person holds shares conjointly 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 section 9 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.

(4) If any law provides that a certain percentage of the members of a Board must represent, be nominated by, or be elected by a group, person or institution, any determination under subsection (2) must as close as possible preserve such percentage: Provided that the effect of such a determination may not be that the number of such members is less than one.

(5) The Minister must cause notice to be given in the *Gazette* of all determinations made under subsection (2) which relate to a public enterprise that has been established by a law.

(6) The Minister must exercise the powers relating to public enterprises in the best interest of the State and the public enterprise concerned with due regard to the purpose for which the enterprise has been established.

(7) Despite the provisions of any law, the Minister must represent the Government as the share holder of a company that is a commercial public enterprise and may exercise all powers of a share holder on behalf of the State.

(8) Directives issued under subsection (1)(e) must be made available to the public, subject to the payment of fees which are not more than the reasonable cost of reproduction: Provided that the publication on a website or the provision of the documents by email is deemed to be compliance with this subsection.

### **Confidentiality of information**

5. (1) A staff member of the Ministry or any consultant engaged by the Ministry must not publish or communicate or in any other way disclose any information relating to the affairs of any public enterprise or a member of the board of a public 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 Minister; or

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- (b) as a result of performing any duty or rendering any service at or to the Ministry.
  - (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 Minister;
    - (b) for the proper administration of justice; or
    - (c) at the request of any staff member of the Ministry or any other person authorised in writing by the Minister.
  - (3) A staff member or person who contravenes subsection (1) commits an offence and is liable on conviction to a fine not exceeding N\$100 000 or to imprisonment for a period not exceeding 2 years, or to both such fine and such imprisonment.

## CHAPTER 2 APPOINTMENT OF MEMBERS OF BOARD

### **Application of this Chapter**

6. (1) This Chapter applies in relation to every public enterprise despite -

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

in its establishing law or document.

(2) Any provision contained in the establishing law or document of a public enterprise which is contrary to a provision of this Chapter must be construed as if it had been amended correspondingly with the provisions of this Chapter.

### **Limit on number of appointments on boards of public enterprises**

7. (1) Subject to subsection (2), a person must not simultaneously serve as a board member on more than two boards of public enterprises, unless the Minister specifically authorises the appointment of a person on more than two boards because a shortage of skills makes the appointment of that person on a further board necessary.

(2) If the provisions of one or more laws have the effect that a person who holds a specific office, serves on a board by virtue of the fact that he or she holds that office and those laws read together require that person to serve on more than two boards, those provisions prevail: Provided that a person referred to in this subsection may not be appointed on a third or further board.

### **Procedure for appointment on board of non-commercial public enterprise or extra-budgetary fund**

8. (1) Whenever it is necessary to appoint members of the board of a non-commercial public enterprise or of an extra-budgetary fund, either upon a first

constitution or a new term of office of members of the board, or for filling a vacancy, staff members designated by the Minister must, after consultation with the relevant Minister, make a report to the Minister containing -

- (a) recommendations on -
  - (i) the number of members, including executive members, if any, to be appointed if the establishing law or document provides that the relevant Minister has a discretion relating to the number in question;
  - (ii) the term for which the members, or members in particular positions are to be appointed if the establishing law or document provides that the relevant Minister has a discretion relating to the term in question; 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;
- (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 public enterprise concerned; and
  - (iii) their commitment, if any, in relation to positions held on boards of other public enterprises and interests held in private undertakings; and
- (d) any other information that may be relevant to enable the Minister to give the advice contemplated in this section.

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

- (a) is not disqualified in terms of the establishing law or document of the public enterprise, from being a member of the board;
- (b) is not disqualified in terms of the Companies Act from being appointed as a director of a company;
- (c) has not been removed from the board of a public enterprise for reasons of incompetence, negligence or dishonesty during a period of five years before the appointment in question; and

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- (d) is not for any other reason an unfit or improper person for that appointment.

(3) After the Minister has considered the report prepared in terms of subsection (1), he or she must forward the report together with his or her advice to the relevant Minister.

(4) When advising a relevant Minister on potential candidates who are most suited for appointment as members of a board, the Minister is not bound by the recommendations of the designated staff members referred to in subsection (1): Provided that if he or she advises that a person recommended in the report, should not be appointed, he or she must specify the reason for that advice in writing and that reason must be contained in the memorandum submitted to Cabinet by the relevant Minister.

(5) After consultation with Cabinet, the relevant Minister has the power to appoint -

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

(6) When making an appointment under subsection (5), the relevant Minister is not bound by the recommendations of the designated staff members referred to in subsection (1) or the advice given under subsection (4): Provided that if he or she does not follow the recommendation or advice, the reason for the departure must be stated in the submission to Cabinet.

(7) The relevant Minister must give notice in the *Gazette* of the appointment of members of the board of a public enterprise and of the date and period of their appointment.

### **Procedure for appointment on board of commercial public enterprise**

9. (1) Whenever it is necessary to appoint members of the board of a commercial public enterprise, either upon a first constitution or a new term of office of members of the board, or for filling a vacancy, staff members designated by the Minister must make a report to the Minister containing -

- (a) recommendations on -
  - (i) the number of members, including executive members, if any, to be appointed if the establishing law or document provides that the Minister has a discretion relating to the number in question;
  - (ii) the term for which the members, or members in particular positions are to be appointed if the establishing law or document provides that the Minister has a discretion relating to the term in question; 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 public enterprise concerned; and
    - (iii) their commitment, if any, in relation to positions held on boards of other public enterprises and interests held in private undertakings; and
  - (d) any other information that may be relevant to enable the Minister to determine the appropriate person to appoint as member of the board.
- (2) For the purposes of subsection (1)(b), a person is qualified to be a member of the board of a public enterprise if the person -
- (a) is not disqualified in terms of the establishing law or document of the public enterprise, from being a member of the board;
  - (b) is not disqualified in terms of the Companies Act from being appointed as a director of a company;
  - (c) has not been removed from the board of a public enterprise for reasons of incompetence, negligence or dishonesty during a period of five years before the appointment in question; and
  - (d) is not for any other reason an unfit or improper person for that appointment.
- (3) After the Minister has studied the report prepared in terms of subsection (1), he or she must appoint the board members in question after consultation with Cabinet.
- (4) When appointing members of a board, the Minister is not bound by the recommendations of the designated staff members referred to in subsection (1): Provided that if he or she appoints a person not recommended by the designated staff members concerned, he or she must state the reason for not appointing a recommended person in the submission to Cabinet.
- (5) The Minister must as soon as possible after an appointment under subsection (3), give notice of that appointment in the *Gazette* and specify the date from which the appointment has been made as well as the period for which the appointment has been made in the notice concerned.

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**Temporary board members**

**10.** (1) If at any time during the term of office of the board of a public 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 relevant Minister may, despite sections 8 and 9 or anything to the contrary in any other law contained, and if circumstances of a pressing or urgent nature so require, 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 Minister may extend the period by an additional period of not more than two months at a time.

(3) If in the circumstances contemplated in subsection (1), a decision of the board is so urgently required that an appointment under that subsection is not possible, the Minister may take a decision on behalf of the board and such decision is deemed to have been taken by the board.

### CHAPTER 3 GOVERNANCE OF PUBLIC ENTERPRISES

**Governance agreement with board**

**11.** (1) The relevant Minister must, within ninety days from the date on which a board has been constituted, and with due regard to any directives laid down by the Minister under section 4(1)(e), enter into a written governance agreement with the board of a public enterprise in relation to -

- (a) the State's expectations in respect of the public enterprise's scope of business, efficiency and financial performance, and achievement of objectives;
- (b) the relevant Minister's obligations in relation to any function conferred or imposed by the establishing law or document of the public enterprise;
- (c) the principles to be followed by the public enterprise for business planning;
- (d) the measures which are necessary to protect the financial soundness of the public enterprise;
- (e) key performance indicators in terms of which the public enterprise's performance will be evaluated;
- (f) the structure of the integrated strategic business plan and the annual 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 public enterprise; and
  - (h) any other matter relating to the performance of the public enterprise's functions under any law.
- (2) The relevant Minister and the board of a public 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 public enterprise during business hours.
- (4) Failure by the board of a public enterprise to sign the governance agreement within a reasonable time is a ground for the removal of the board.
- (5) Subject to directives issued under section 4(1)(e)(v), failure by the board of a public 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 public enterprise: Provided that where -
- (a) such failure is substantial; and
  - (b) the other party to an agreement which was concluded as a result of such failure, is aware of the failure or should reasonably have known of that failure,

that agreement is voidable at the instance of the public enterprise and the Minister may instruct the public enterprise to have the agreement declared void.

### **Performance agreements with board members individually**

**12.** (1) The relevant Minister must, within ninety days of appointing a person as a member of a board, enter into a performance agreement with that member, with due regard to any directives laid down by the Minister under section 4(1)(e).

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

- (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 public 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 public enterprise; and

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- (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 public 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 relevant Minister, in the name of the relevant public enterprise, may recover from the person as a debt due to the public 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; or
- (b) if the public 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) Failure by a member of the board of a public enterprise to sign the performance agreement within a reasonable time is a ground for the removal of that member.

(6) A contravention referred to in subsection (3) by a member of the board of a public enterprise, constitutes a ground for the removal of that member from his or her office by the relevant Minister.

### **Integrated strategic business plan**

**13.** (1) A public enterprise must develop an integrated strategic business plan for a period of five years and submit it to the relevant Minister within one year from the commencement of this Act and thereafter before the period of the current integrated strategic business plan has ended.

(2) In the case of a commercial public enterprise -

- (a) the Minister must forward the integrated strategic business plan submitted to him or her to any other Minister who in his or her opinion has a substantial interest in that public enterprise, for information and comment, if any; and
- (b) the Minister must after considering any comments received in terms of paragraph (a), approve the integrated strategic business plan if he or she is satisfied with it or must refer it back to the board of the public enterprise, together with his or her comments and instructions for amendments thereto.

(3) In the case of a non-commercial public enterprise or an extra-budgetary fund -

- (a) the relevant Minister must forward the integrated strategic business plan submitted to him or her to the Minister for information and comment, if any; and
  - (b) the relevant Minister must after considering any comments received in terms of paragraph (a), approve the integrated strategic business plan if he or she is satisfied with it or must refer it back to the board of the public enterprise, together with his or her comments and instructions for amendments thereto.
- (4) The Integrated Strategic Business Plan of a public enterprise must encompass all the businesses and activities, including investments, of the public enterprise and its subsidiaries, if any.
- (5) The integrated strategic business plan of a public enterprise must include -
- (a) a statement of -
    - (i) the purpose, vision and strategy of the public enterprise; and
    - (ii) governance, organisation and management arrangements;
  - (b) key performance indicators at enterprise level as they relate to financial performance and sector specific indicators, as well as relevant development impact indicators such as employment, positive environmental impact, gender balance, down and upstream opportunities, and innovation;
  - (c) a five-year business implementation plan to include, a marketing plan, an operations plan, an investment plan, financial projections, work force plan and skills development plan, financing plan and risk management plan; and
  - (d) any other matters as may be agreed on by the relevant Minister and the board of the public enterprise from time to time.

#### **Annual business and financial plan**

**14.** (1) Every public enterprise must annually, at least 90 days before the commencement of its next financial year, submit an annual business and financial plan to the relevant Minister.

- (2) In the case of a commercial public enterprise -
  - (a) the Minister must forward the integrated annual business and financial plan submitted to him or her to any other Minister who in his or her opinion has a substantial interest in that public enterprise, for information and comment, if any; and
  - (b) the Minister must after considering any comments received in terms of paragraph (a), approve the annual business and financial plan if he or she is satisfied with it or must refer it back to the board of the

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public enterprise, together with his or her comments and instructions for amendments thereto.

(3) In the case of a non-commercial public enterprise or an extra-budgetary fund -

(a) the relevant Minister must forward the annual business and financial plan submitted to him or her to the Minister for information and comment, if any; and

(b) the relevant Minister must after considering any comments received in terms of paragraph (a), approve the integrated strategic business plan if he or she is satisfied with it or must refer it back to the board of the public enterprise, together with his or her comments and instructions for amendments thereto.

(4) The annual business and financial plan of a public enterprise must encompass all the businesses and activities, including investments, of the public enterprise and its subsidiaries, if any.

(5) The annual business and financial plan of a public enterprise must include -

(a) a statement of the public enterprise's expected performance for the next financial year as compared to its projected objectives for that year as set out in its integrated strategic business plan;

(b) the operating budget and the capital budget of the public 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 public 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 public enterprise intends to borrow money in the next financial year, a general indication of the borrowing plans and strategies of the public enterprise for that year;

(e) a statement of the kind of information to be furnished to the relevant Minister and the Minister in respect of the public enterprise during the course of a financial year, including the information to be included in each annual report;

(f) any proposed departure from its integrated strategic business plan and the reason for such departure; and

(g) any other matters as may be agreed on by the relevant Minister and the board of the public enterprise from time to time.

**Approval of annual budget of public enterprise**

**15.** (1) After considering comments on the annual financial and business plan provided as contemplated in section 14(2) or 14(3), as the case may be, the relevant Minister must provide the public enterprise in writing with his or her comments (as well as comments provided as contemplated in section 14(2) or 14(3), as the case may be) in relation to its budget for the next financial year.

- (2) The board of a public enterprise must -
- (a) consider any comments received from the relevant Minister in terms of subsection (1) within 30 days of their receipt;
  - (b) consult with the relevant Minister and the member of Cabinet who made the comments, 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 relevant Minister and the Minister, in the case of a non-commercial public enterprise or an extra-budgetary fund, with a copy of the completed budget within 2 months after the commencement of the financial year.

(3) A public enterprise must not incur any expenditure except in accordance with an estimate of expenditure approved under this section: Provided that the Minister may give his or her permission for the incurring of expenditure not contained in the estimate if unforeseen circumstances have arisen since the preparation of the estimate.

**General provisions relating to business plans and budget**

**16.** (1) A public enterprise must act only in accordance with its integrated strategic business plan, its annual business and financial plan and its budget, unless it has first obtained the written approval of the relevant Minister to do otherwise.

(2) Nothing done by a public enterprise is void or unenforceable merely because it has failed to comply with subsection (1): Provided that where -

- (a) such departure is substantial; and
- (b) the other party to an agreement which constitutes that departure is aware of the departure or should reasonably have known of that departure,

that agreement is voidable at the instance of the public enterprise and the Minister may instruct the public enterprise to have the agreement declared void.

(3) No person may publish or disclose information or material contained in an integrated strategic business plan, an annual business and financial plan or a budget of a public enterprise, except -

- 
- (a) with the approval of the board of a public enterprise and the relevant Minister;
  - (b) for the purpose of performing a function under this Act or any other law; or
  - (c) for the proper administration of justice.

(4) A person who contravenes subsection (3) commits an offence and is liable on conviction to a fine not exceeding N\$100 000 or to imprisonment for a period not exceeding 2 years, or to both such fine and such imprisonment.

#### **Performance agreements of management staff of public enterprises**

**17.** (1) The board of a public enterprise must require the chief executive officer, and such other senior management staff of the public 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 Minister under section 4(1)(e).

(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 public enterprise, constitutes a ground for his or her dismissal from the service of the public enterprise, subject to compliance with the rules of natural justice.

#### **Remuneration of board members and management staff of public enterprises**

**18.** (1) The remuneration and allowances payable to the members and alternate members of a board of a public enterprise must be determined by the relevant Minister with the concurrence of the Minister responsible for Finance and with due regard to any directives laid down by the Minister under section 4(1)(e).

(2) Despite the provisions of any law to the contrary, full remuneration is payable to a member of a board who is in the full-time service of the State: Provided that if such person is a member of the board as a result of the position held by him or her in the State, no remuneration may be paid to that person.

(3) The remuneration and other service benefits of the chief executive officer and other management staff of a public enterprise must be determined by the board of the public enterprise with the concurrence of the relevant Minister, with due regard to any directives laid down by the Minister under section 4(1)(e).

#### **Minister to be notified of significant affecting events**

**19.** If any event occurs that may prevent, or significantly affect the achievement of the objectives of a public enterprise or any of its subsidiaries, if any, under its integrated strategic business plan or its annual financial plan, or achievement of the targets under those plans, the board must immediately notify the Minister, the Minister responsible for Finance and the relevant Minister of that affecting event and the reasons therefor.

**Duty to furnish information**

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

- (a) any business or activity carried on or undertaken or to be carried on or undertaken by the public enterprise or any of its subsidiaries in accordance with its integrated strategic business plan or its annual financial plan, and in respect of any period covered by the integrated strategic business plan or the annual financial plan;
- (b) any business or activity carried on or undertaken or to be carried on or undertaken by the public enterprise or any of its subsidiaries otherwise than in accordance with its integrated strategic business plan or its annual financial plan; or
- (c) any matter contained in the annual report of the public enterprise in terms of section 22.

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

- (3) A chief executive officer who -
- (a) refuses or fails to furnish information requested by the Minister 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\$100 000 or to imprisonment for a period not exceeding 2 years, or to both such fine and such imprisonment.

(4) A reference in this section to a plan or other document is construed to include a reference to a similar document prepared before the commencement of this Act.

**Dividends**

**21.** The board of a commercial public enterprise must -

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

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## Annual reports of public enterprises

22. (1) The board of a public enterprise must as soon as possible, but in any case not later than six months after the end of each financial year of the public enterprise, submit an annual report on the operations of the public enterprise in that year to the relevant Minister, and simultaneously to the Minister in the case of a non-commercial public enterprise or an extra-budgetary fund.

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

(3) The relevant Minister must cause a copy of the report of a public 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.

## Investment policies

23. (1) Within 90 days of the date of commencement of this Act, the board of a public enterprise must compile and submit to the relevant Minister for approval a statement on the policies, standards and procedures to be applied so as to guide the public enterprise in effectively supervising, monitoring and managing transactions for investing money of the public enterprise, including altering an investment or dealing with it in a manner affecting the terms of the initial investment or reinvesting money becoming available upon maturity date.

(2) The relevant Minister may provide the public enterprise in writing with any comments in relation to its statement on investment policies, standards and procedures submitted under subsection (1) or amendment to such statement, and require the board to consult with the relevant Minister on such comments.

(3) The relevant Minister must consult with the Minister responsible for Finance on the statement on investment policies, standards and procedures, or an amendment to such statement, before the Minister approves such statement.

(4) The board of a public enterprise may from time to time submit to the relevant Minister for approval any amendment to its statement on investment policies, standards and procedures as approved by the relevant Minister.

(5) The board of a public enterprise must take all reasonable steps to ensure that the provisions of its statement on investment policies, standards and procedures are observed within the administration and management of the affairs of the public enterprise.

### **Obligations concerning subsidiaries**

**24.** (1) The Minister may by regulation impose obligations in relation to any subsidiary of any public 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 public enterprise or the board or senior management of the subsidiary and may include requirements with regard to -

- (a) the composition of the governing board of a subsidiary and the appointment process of the board;
- (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 Act in relation to a public enterprise.

(3) A provision contained in the memorandum or articles of a subsidiary of a public 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.

## CHAPTER 4 SPECIAL INVESTIGATIONS

### **Power to direct special investigation**

**25.** If the Minister (after consultation with the relevant Minister in the case of a non-commercial public enterprise or an extra-budgetary fund) considers it necessary or desirable for any reason, the Minister may direct that a special investigation be conducted in relation to any matter concerning the business, trade, dealings, affairs, assets or liabilities of a public enterprise.

### **Appointment of special investigator**

**26.** The Minister may appoint a staff member or, one or more other persons as special investigators, on such terms and conditions as are determined and specified by the Minister in the instrument of appointment or as varied by a later instrument, to conduct an investigation referred to in section 25.

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**Powers of special investigator**

27. (1) A special investigator may, by notice in writing, require any member of the board or an employee of the public enterprise to which the directive in terms of section 25 relates -

- (a) to produce to the investigator such documents relating to a matter to which the investigation relates as are in the custody or under the control of the person;
- (b) to give to the investigator all possible and reasonable assistance in connection with the investigation;
- (c) to appear before the investigator for examination and to answer questions.

(2) Notwithstanding any oath or other obligation of secrecy imposed by law or otherwise, a person on whom a notice referred to in subsection (1) is served must, comply with the requirements of that notice within the time specified therein.

(3) A special investigator may make copies of, or take extracts from, documents produced under subsection (1).

(4) The powers of a special investigator extend not only to the matters or affairs specified in a directive referred to in section 25 but also to any other matter of which the investigator becomes aware and which the investigator considers should be brought to the attention of the Minister.

**Publication**

28. Subject to any directions of the Minister, a special investigator may -

- (a) make public statements as to the nature and conduct of an investigation; and
- (b) invite and receive information or submissions as to any matter relevant to the investigation from such persons as the investigator thinks fit.

**Reports**

29. (1) After a special investigation has been completed, the special investigator must submit a report to the Minister in which he or she -

- (a) sets out all the material findings of the investigation;
- (b) makes such recommendations as he or she thinks necessary; and
- (c) states whether there is evidence of corrupt or other criminal activities.

(2) A special investigator may make written or oral reports to the Minister in the course of an investigation.

(3) A report referred to in subsection (2) may include such recommendations as the special investigator thinks fit.

(4) If the Minister thinks after studying a report submitted in terms of this section, that -

- (a) there is reason to suspect that any corrupt activity has occurred, he or she must refer the report to the Anti-corruption Commission established by section 2 of the Anti-corruption Act, 2003 (Act No. 28 of 2003); or
- (b) there is reason to suspect that any other criminal activity has occurred, he or she must refer the report to the Inspector-General of the Namibian Police Force.

(5) A special investigator is not, in the absence of malice, liable to an action for defamation at the suit of any person in respect of any statement made, whether orally or in writing, in the course of carrying out any function under this Chapter.

#### **Expenses of special investigation**

**30.** (1) The expenses of and incidental to an investigation must be defrayed from money appropriated by Parliament for the purpose.

(2) If the Minister is of the opinion that the whole or any part of the expenses of or incidental to an investigation should be paid by the public enterprise the affairs of which were investigated, the Minister may in writing direct the enterprise to pay such amount, within the time and in the manner specified.

#### **Offences in relation to special investigation**

**31.** A person who -

- (a) fails to comply with a lawful direction of a special investigator;
- (b) without lawful reason, refuses or fails to produce documents or answer questions sought or asked by a special investigator;
- (c) hinders or obstructs a special investigator;
- (d) wilfully destroys or alter any document or any other thing relevant to an investigation,

commits an offence and is liable on conviction to a fine not exceeding N\$100 000 or to imprisonment for a period not exceeding 2 years or to both such fine and such imprisonment.

## **CHAPTER 5 RESTRUCTURING OF PUBLIC ENTERPRISES**

#### **Provisional identification of public enterprise for restructuring**

**32.** (1) The Minister, in consultation with the Cabinet, may provisionally identify any public enterprise to be considered for restructuring, hereinafter referred to as “restructuring enterprise”.

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(2) Before making a provisional identification under subsection (1), the Minister must consult with the relevant Minister and the board of the public enterprise concerned.

(3) The Minister must forthwith give notice in writing to the board of a public enterprise of the fact that it has been provisionally identified as contemplated in subsection (1).

(4) Within 30 days of receipt of a notice in terms of subsection (3), or such longer period as the Minister may approve, the board of a restructuring enterprise must submit to the Minister a full and detailed risk and impact assessment report, certified by the external auditors of the public enterprise, on all risks and consequences of the proposed restructuring, which must inter alia take into account -

- (a) all existing agreements with any third parties;
- (b) all rights and obligations of the public enterprise in respect of third parties; and
- (c) any other relevant information pertaining to the operations of the public enterprise.

### **Proposal for restructuring**

**33.** (1) The Minister may, in writing, direct designated staff members to prepare and submit to the Minister proposed plans for the restructuring of a public enterprise provisionally identified under section 32(1).

(2) A restructuring plan must contain detailed proposals on the proposed method or methods of restructuring of the public enterprise, which may include -

- (a) in the case of a public enterprise not being a company, that the public enterprise -
  - (i) be converted into a company registered under the Companies Act; or
  - (ii) forms or acquires a company to which specified assets, liabilities and undertakings of the public enterprise must be transferred;
- (b) that a public enterprise which is not a company be converted into a state-owned company;
- (c) that the share capital of a state-owned company be reorganised and made available, either in full or in part, for disposal to members of the public;
- (d) that the undertaking and assets and liabilities, or certain specified assets and liabilities of the public enterprise be transferred to another public enterprise;

- (e) that the undertaking and assets of a public enterprise, or part of its undertaking and certain of its assets, be offered for disposal to members of the public;
- (f) that a public enterprise be liquidated;
- (g) in the case of a proposal referred to in paragraph (a) or (b), the proposed distribution of shares in the proposed company, either to the State as sole share holder, or to the State and members of the public or solely to members of the public;
- (h) any other method through which the restructuring of a public enterprise should be effected; and
- (i) any measures, including the making or amending of any law, which may be required to achieve the restructuring of the public enterprise as proposed.

(3) In approving or determining a proposed plan for restructuring, the Minister must give consideration to the inclusion of schemes on achieving empowerment objectives through increasing private sector participation, and in particular for the empowerment of persons who have been disadvantaged by past discriminating laws and practices that were applied before the date of Namibia's independence.

(4) In subsection (3), "empowering objectives" means objectives to increase the number of historically disadvantaged persons who -

- (a) have ownership or control of enterprises; or
- (b) serve in executive and senior capacities in the management of enterprises.

### **Consultation**

**34.** In formulating a proposed restructuring plan, the designated staff members referred to in section 33(1) must -

- (a) consult on a continuous basis with the relevant Minister, the board, the chief executive officer, other senior management staff of the relevant public enterprise and any other relevant stakeholder;
- (b) take into account -
  - (i) the purpose for which the public enterprise was established originally;
  - (ii) the risk assessment and impact report submitted in terms of section 32(4);
  - (iii) the performance of the public enterprise concerned since its establishment;
  - (iv) the reasons which prompted the provisional identification of the public enterprise for restructuring; and

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- (v) any representations made by any relevant stakeholder; and
  - (c) act in accordance with such directives as the Minister may give.

### **Interim measures**

**35.** (1) The Minister, by notice published in the *Gazette*, may declare that the constitution of the board of a restructuring enterprise, not being a public enterprise established by an Act of Parliament, be changed as specified in the notice, and may -

- (a) change the number of members of the board;
  - (b) determine the qualifications of persons for, or terms and conditions of, appointment to the board;
  - (c) determine the manner of appointment of the chairperson and deputy chairperson; or
  - (d) make such other changes to the composition of the board as the Minister considers necessary or expedient.
- (2) The Minister, with the concurrence of the relevant Minister, may -
- (a) by notice published in the *Gazette*, alter or vary the functions of a restructuring enterprise;
  - (b) direct the board of a restructuring enterprise to take any specified steps which the Minister considers necessary for reorganising its affairs in anticipation of its restructuring,

despite anything to the contrary in the establishing law or document of the restructuring enterprise.

(3) Despite anything to the contrary in its establishing law or document or in any other law or instrument conferring functions or powers on it, a restructuring enterprise may do all things necessary to comply with, and must comply with, a direction under subsection (2).

### **Determination of restructuring**

**36.** The Minister must submit a proposed plan for the restructuring of a provisionally identified public enterprise to the Cabinet for determination.

### **Information and reports**

**37.** The board of a restructuring enterprise must, at a time and manner determined by the Minister, submit to the Minister -

- (a) such information as the Minister may require;
- (b) a business plan in a form approved by the Minister;
- (c) a report on such matters as may be specified by the Minister.

CHAPTER 7  
GENERAL PROVISIONS

**Regulations**

- 38.** (1) The Minister may make regulations -
- (a) prescribing specific information that must be provided under prescribed circumstances and within prescribed periods, to the Minister, the relevant Minister or any other functionary;
  - (b) prescribing duties for the board, members of the board or employees of public enterprises;
  - (c) prescribing records to be kept and prescribing how such records must be dealt with (including to whom such records must or may be made available);
  - (d) prescribing penalties for contravening of a provision of this Act or provisions of regulations and providing for panels to hear allegations of such contravention or failure to comply with such provisions and prescribing the manner of enforcing such penalties;
  - (e) prescribing such subcategories of the categories of public enterprises specified in section 2(2) and may impose such additional obligations or may provide for exemptions from the provisions of this Act for such subcategories;
  - (f) prescribing circumstances under which a contravention of this Act or regulations or failure to comply with a provision of this Act or a regulation will be a ground for the removal of a member of the board of a public enterprise;
  - (g) prescribing the method for investigating grounds for the removal of a member of a board or the chief executive officer of a public enterprise and despite the provisions of the establishing law or document of the public enterprise, any procedural matter relating to such removal including the establishment of panels to investigate the matter and to make recommendations to the relevant Minister;
  - (h) prescribing common policy frameworks for the operation of public enterprises, relating to human resources, assets and finance;
  - (i) prescribing any matter relating to the performance measurement and evaluation of public enterprises;
  - (j) prescribing any duty or obligation that is necessary to promote or enforce good corporate governance;
  - (k) prescribing any matter on which the Minister may issue directives under section 4(1)(e); and

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(1) in relation to or with respect to any matter required or permitted by this Act to be prescribed or necessary or expedient to be prescribed to give effect to this Act.

(2) Regulations made under subsection (1) may create offences and may prescribe penalties for such offences which do not exceed N\$100 000 or imprisonment for a period not exceeding two years or both such fine and such imprisonment.

(3) Penalties imposed under subsection (1)(d) may not exceed N\$100 000 and may be recovered as a debt due to the Government of Namibia.

### **Limitation of liability**

39. Neither the Minister nor any person engaged in carrying out any provision of this Act, is liable in respect of anything done or omitted in good faith and not attributable to intent or negligence in the exercise of a power or performance of a duty or function under or by virtue of this Act or in respect of anything that may result therefrom.

### **Exemptions**

40. Upon application of a public enterprise, and on good cause shown, the Minister may by notice in the *Gazette* exempt the public enterprise from any of the provisions of this Act.

### **Provisions of this Act prevail**

41. The provisions of this Act prevail if a conflict relating to any matter provided for in this Act arises between this Act and the provisions of the establishing law or document of a public enterprise.

### **Repeal of laws and savings**

42. (1) The laws specified in the Schedule are repealed to the extent specified in Column 3.

(2) A person who immediately before the date of commencement of this Act, held office of chairperson, vice chairperson, member or alternate member of a board of a public enterprise is deemed to have been appointed in accordance with the provisions of this Act for the unexpired period of his or her office.

(3) A directive issued under an act repealed by subsection (1) is deemed to have been issued under this Act.

(4) All public enterprises listed in Schedule 1 of the Public Enterprises Governance Act, 2006 (Act No. 2 of 2006), are deemed to have been declared to be public enterprises under section 2.

(5) A public enterprise referred to in subsection (4) is deemed to have been declared to be an extra-budgetary fund if -

(a) it was established for the sole or major purpose of administering, allocating or utilising funds intended for a specific purpose; and

(b) those funds are obtained from moneys appropriated by Parliament or obtained from a levy imposed for the purpose referred to in subparagraph (a).

(6) A public enterprise referred to in subsection (4) and that does not comply with subsection (5) is deemed to have been declared to be a non-commercial public enterprise if -

(a) it has been established for the sole purpose of performing a regulatory function; or

(b) the public enterprise performs a public function and is substantially funded from money appropriated by parliament or from levies imposed by law.

(7) A public enterprise referred to in subsection (4) and which does not comply with subsection (5) or (6), is deemed to have been declared to be a commercial public enterprise under section 2.

(8) All provisions in laws that remain applicable as contemplated in section 48(1) of the Public Enterprises Governance Act, 2006 (Act No.2 of 2006) in spite of their amendment by section 49 of that Act, will continue to be so applicable, until they are amended as contemplated in section 2(4), or in another lawful manner.

#### Short title and commencement

**43.** (1) This Act is called the Public Enterprises Governance Act, 2018 and comes into operation on a date determined by the Minister by notice in the *Gazette*.

(2) Different dates may be determined under subsection (1) for different provisions of this Act.

#### SCHEDULE

(Section 42(1))

Column 1	Column 2	Column 3
No. and year of law	Title of law	Extent of repeal
Act no 2 of 2006	Public Enterprises Governance Act, 2006	The whole
Act No. 5 of 2008	State-owned Enterprises Governance Amendment Act, 2008	The whole
Act No. 8 of 2015	Public Enterprises Amendment Act, 2015	The whole