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## GENERAL NOTICES

Public Enterprises, Department of

*General Notices*

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## GENERAL NOTICES

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### NOTICE 567 OF 2007

#### DEPARTMENT OF PUBLIC ENTERPRISES

#### NOTICE INVITING COMMENTS

The Minister of Public Enterprises intends to introduce the Broadband Infraco Bill 2007.

Interested persons are hereby invited to submit written comments or written representation on the draft Bill, within 30 days of the date of publication of this notice at any of the following addresses:

For attention: Ursula Nobulali Fikelepil Denzel Matjila  
Legal, Governance and Secretariat

Post to: Private Bag X 15  
Hatfield  
0028

Or hand delivered to: Suite 401  
InfoTech Building  
Arcadia Street  
Hatfield  
0083

Or fax to (012) 342 4146

Or e-mail to: [Denzel.Matjila@dpe.gov.za](mailto:Denzel.Matjila@dpe.gov.za)

Please note that comments received after the closing date may be disregarded. Ursula 1Denzel can be reached at (012) 4-31 1131/1194 for enquiries.

REPUBLIC OF SOUTH AFRICA

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**BROADBAND INFRACO BILL**

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*(To be introduced in the National Assembly (proposed as section 75):  
explanatory summary of Bill to be published in Government Gazette No. 0000 of  
[date])*

*(The English text is the official text of the Bill)*

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(MINISTER OF PUBLIC ENTERPRISES)

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**BILL**

- **To provide for the establishment of Infraco Broadband (Proprietary) Limited and related matters.**

**Preamble**

Since the State intends expanding availability of broadband access to underdeveloped areas and ensuring that the bandwidth requirements for specific projects of national interest are met;

And since, the State intends establishing Infraco Broadband with the purpose of owning communications infrastructure that will enable it to provide affordable access to broadband services,

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

**1. Definitions**

In this Act, unless the context otherwise indicates-

- (1) "Broadband Infraco Limited" means Infraco Broadband, a public company duly incorporated in terms of the Companies Act;
- (2) "Broadband Infraco (Proprietary) Limited" means Infraco Broadband, a limited liability company incorporated in terms of the Companies Act;
- (3) "Companies Act" means the Companies Act, 1973 (Act No. 61 of 1973);
- (4) "conversion date" means the date determined by the Minister in terms of the provisions of section 8(1);
- (5) "electronic communications" means electronic communications as defined in section 1 of the Electronic Communications Act;
- (6) "Electronic Communications Act" means the Electronic Communications Act, 2005 (Act No 36 of 2005) or any succeeding legislation regulating electronic communications;

- (7) "electronic communications network" means electronic communications network as defined in section 1 of the Electronic Communications Act;
- (8) "electronic communications network services" means electronic communications network services as defined in section 1 of the Electronic Communications Act;
- (9) "Eskom" means Eskom Holdings Limited, a public company duly incorporated under the Companies Act, and/or any of its subsidiaries;
- (10) "FSN" means the Full Services Network Assets comprising the national fibre optic network independently developed and deployed by Eskom and Transnet, respectively;
- (11) "Infraco" means Broadband Infraco (Proprietary) Limited, and with effect from the conversion date, Infraco Broadband Limited;
- (12) "Legal Succession Act" means the Legal Succession to the South African Transport Services Act, 1989 (Act No.9 of 1989);
- (13) "Minister" means the Minister of Public Enterprises;
- (14) "prescribed" means prescribed by Regulation in terms of section 10;
- (15) "PFMA" means the Public Finance Management Act, 1999 (Act No.1 of 1999);
- (16) "State" means the Government of the Republic of South Africa acting through the Minister;
- (17) "this Act" includes any Regulation in terms of section 10;
- (18) "Transnet" means Transnet Limited, a company duly incorporated in terms of section 2 of the Legal Succession Act and/or any of its subsidiaries;
- (19) "transfer date" means the date on which the shareholding in Infraco is transferred to the State.

## 2. **Objects of Act**

The objects of this Act are to-

- (a) provide for the acquisition of the shareholding in Infraco by the State;

- (b) provide for the transfer of the FSN from Eskom, Transnet and/or their subsidiaries; and
- (c) provide for the conversion of Infraco into a public company with share capital.

3. **Establishment of Infraco**

The State is authorised to acquire shareholding in Infraco by agreement between the State and Eskom.

4. **Objects and powers of Infraco**

- (1) The main object of Infraco is to provide affordable broadband access.
- (2) For the purposes of section 33(1) of the Companies Act, none of the objects ancillary to the main objects of Infraco are excluded.
- (3) The powers of Infraco are as set out in schedule 2 to the Companies Act and none of such powers are excluded or qualified.
- (4) With effect from the transfer date, the Minister may, in consultation with the Ministers of Finance and Communications, and in accordance with any applicable provision of the PFMA, in one or more transactions, transfer the whole or any part of the shares, assets, rights, obligations or interests of the State in relation to Infraco to such transferees, in such manner and on such terms and conditions as may be permitted in terms of any applicable provision of the PFMA.

5. **Borrowing powers of Infraco**

Subject to the PFMA, Infraco may borrow money or issue a guarantee, indemnity or security, or enter into any transaction necessary to achieve objects referred to in section 4.

6. **Servitudes**

- (1) With effect from the transfer date-
  - a) Infraco shall be the owner of the FSN; and

- b) Infraco shall exercise all of the rights attaching to the FSN.

(2) With effect from the transfer date:

- a) For the purposes of this subsection, 'servitude' means any servitude, lease, right of use or other real right in or over land in favour of Eskom and Transnet, which existed immediately prior to the commencement of this Act, for the conveyance or provision of electricity, telecommunications, pipelines, railways, transport or electrical substations or for the construction, use and maintenance of electronic communication networks.
- b) Every servitude is hereby extended so as to include the additional right to use the land to which such servitude relates for purposes of using and maintaining existing electronic communications networks and of providing electronic communications network services, as well as the right of entry upon such land, and of constructing, erecting and maintaining thereon further electronic communications networks.
- c) Eskom and Transnet must allow Infraco in respect of any servitude to -
  - (i) utilise such servitude in respect of the additional right referred to in subsection (b) on such terms and conditions as may be agreed upon between Infraco, Eskom and Transnet, as the case may be, and in the absence of agreement, on such terms and conditions as the Minister may determine;
  - (ii) utilise such servitude in respect of that additional right in favour of Infraco in order to provide electronic communications network services to fulfil its purpose and mandate under this Act and its founding documents.
- d) Transnet shall register servitudes in respect of land owned by Transnet in favour of Infraco.
- e) Compensation as contemplated in section 25(3) of the Constitution shall be payable by Infraco in respect of the additional right contemplated in paragraph (b) to the registered land owner concerned for the use of such additional right, to the extent that the said additional right

renders the servitude more onerous than the original servitude.

- f) Notice of the exercise or use of the additional right by Infraco in terms of subsection (c) shall be given by Infraco in writing to the registered owner of the land concerned before the commencement of such exercise or use, either by personal service or by pre-paid registered post to the postal address of such owner, and the compensation contemplated in subsection (e) shall be payable and shall be assessed as at the date of such commencement.
- g) Sections 9,10,11,12(3) and (4),14 and 15 of the Expropriation Act shall, with the necessary changes, apply in respect of any compensation claimed, compensation offer and the payment and determination of such compensation, as if the notice contemplated in subsection (f) were a notice of expropriation in terms of section 7 of the Expropriation Act; provided that: any reference in the said sections to compensation as provided for in sections 12(1) and (2) of that Act, will be construed as a reference to the contents of section 25(3) of the Constitution;
- h) The provisions of section 7(7) apply to the assessment of the amount of compensation to which the owner is entitled in terms of subsection (e);
- i) The Registrar of Deeds shall, upon the lodgement of the necessary deeds and documentation, register a notarial deed of amendment, as may be necessary for the purposes of recording the extension of a servitude in terms of subsections (b) and (c) and recording the registration of a servitude in terms of subsection (d).

7. **Expropriation of land or a right in land by Minister on behalf of Infraco**

- (1) If Infraco satisfies the Minister that it reasonably requires any particular land or right in land for public purposes or in the public interest and for the attainment of its objects and that it is unable to acquire it on reasonable terms, the Minister may expropriate such land or right in land on behalf of Infraco, subject to the obligation to pay compensation as contemplated in section 25(3) of the Constitution.



- (2) If the Minister expropriates any land or right in land on behalf of Infraco, Infraco shall become the owner thereof on the date of expropriation as defined in section 7(2) of the Expropriation Act.
- (3) There shall be payable in respect of the expropriation of any land or right in land in terms of subsection (1) the fees, duties and other charges which would have been payable by Infraco in terms of any law if it had purchased that property.
- (4) All costs incurred by the Minister in the performance of his functions in terms of subsection (1) shall be refunded to him by Infraco.
- (5) Subject to section 25(2) of the Constitution, the following provisions of the Expropriation Act are applicable, with the necessary changes, in respect of an expropriation in terms of subsection (1), namely sections 6 to 11, sections 12(3) and (4) and sections 14, 15, 18 to 21 and 23: provided that any reference in the said sections to compensation as provided for in sections 12 (1) and (2) of that Act, will be construed as a reference to the contents of section 25(3) of the Constitution;
- (6) All unregistered rights with respect to the expropriated land or right in land, must be expropriated separately and the said sections of the Expropriation Act apply with the necessary changes to such expropriations.
- (7) In assessing the amount of compensation to which any expropriatee may be entitled as contemplated in section 25(3) of the Constitution, the provisions of sections 12(5)(a) to (f) and (h) of the Expropriation Act must be applied inasmuch as it is just and equitable to do so: provided that a reference to any unregistered right in respect of any other property in section 12(5)(e) of the said Act, does not apply.
- (8) The provisions of this section 7 shall apply only for as long as the State is the majority shareholder in Infraco.

## 8. Conversion of Infraco into a public company

- (1) After the transfer date, the Minister may, on behalf of the State request the Registrar of Companies in writing to convert Infraco into a public company having a share capital in accordance with the Companies Act.

- (2) The request must be accompanied by the memorandum of association and articles of association of the intended public company that must be-
  - (a) framed in accordance with the Companies Act, but subject to this Act; and
  - (b) signed by the Minister on behalf of the State.
- (3) On the receipt of the request and the memorandum and articles so signed, the Registrar of Companies must -
  - (a) register the conversion of Infraco into a public company having a share capital, as well as the memorandum and articles; and
  - (b) issue an amended certificate of incorporation.
- (4) The name of the public company referred to in subsection (3) (a) shall be Infraco Broadband Limited.
- (5) No additional fee referred to in section 63 (2) of the Companies Act is payable in respect of the registration of the memorandum and articles referred to in subsection (3) (a).
- (6) The Registrar of Companies must issue such directives and authorise such deviations from the regulations in force in terms of the Companies Act and the documents prescribed in terms thereof as he or she may consider necessary in order to give effect to this section.
- (7) The provisions of sections 32, 44(1), 54(2), 66, 190 and 344(d) of the Companies Act shall not apply to Infraco Broadband Limited for so long as the State holds not less than 75 percent or more of the total issued ordinary shares in Infraco.

## 9. **Effect of conversion**

- (1) The conversion contemplated in section 8 will not affect-
  - a) the continued corporate existence of Infraco under the Companies Act;
  - b) any of the rights, liabilities or obligations acquired or incurred by Infraco before the conversion date; or
  - c) the terms and conditions of service of Infraco's employees.

**10. Regulations**

The Minister may, by notice in the *Government Gazette*, make regulations regarding any ancillary or incidental administrative or procedural matter that it is necessary to prescribe for the proper implementation or administration of this Act, including the procedure to be followed by Infraco in respect of a request to the Minister for the expropriation of land or a right in land as contemplated in section 7 and financial provision by Infraco in respect of all costs incurred or to be incurred by the Minister in the performance of his or her functions in terms of section 7(1).

**11. Short title and commencement**

This Act is called the Infrastructure Broadband Company Act, 2006 and comes into operation on a date determined by the President of the Republic of South Africa by proclamation in the *Gazette*.

## **MEMORANDUM ON THE OBJECTS OF THE BROADBAND INFRACO BILL**

### **1. BACKGROUND**

- 1.1 The Government of the Republic of South Africa ("Government") represented by the Minister of Public Enterprises intends expanding the availability of broadband access to underdeveloped areas and ensuring that the bandwidth requirements for specific projects of national interest are met. In order to achieve this the Government will establish a State-Owned Enterprise ("SOE"), Broadband Infraco (Pty) Ltd ("Infraco") that will acquire a national backbone fibre optic network ("FSN") from Eskom Enterprises (Pty) Ltd ("Eskom") and Transnet Limited ("Transnet").
- 1.2 Investigations into the high broadband costs in South Africa compared to international counterparts revealed that connectivity providers, other than Telkom Limited ("Telkom"), have a cost structure where up to 80% of costs comprise costs attributable to Tier 1 national backbone connectivity and Tier 3 international connectivity, both of which are supplied by Telkom. The logical conclusion was to intervene to address these national backbone and international connectivity cost structures. This is based on the assumption that if these costs are addressed, Tier 2 (the Local Metropolitan Area network and last mile) connectivity providers would quickly pass this onto the market as a result of competitive pressure.
- 1.3 The most obvious structure to be used for this purpose is the fibre optic backbone known as the FSN.
- 1.4 The proposed model was an SOE (Infraco) that will own the FSN. Infraco is intended to earn an economic return sufficient to recover all costs and enable continued investment on the infrastructure. The key advantage of Infraco is the assurance that sub-economic markets will be sufficiently covered enabling the delivery of

government and other services via good quality and affordable broadband.

- 1.5 The Bill enables flexibility for funding, private sector involvement as well as a possible conversion into a public company. Public companies are generally recognised as the optimal corporate form to access capital markets and enable future private sector investment, where necessary.

## 2. OBJECTS

The objects sought to be achieved through the enactment of the Bill are to provide for-

- (a) the acquisition by the State of shareholding in Infraco;
- (b) the acquisition of the FSN from Eskom, Transnet and/or any of their subsidiaries; and
- (c) the conversion of Infraco into a public company with share capital.

## 3. Bodies consulted

The Department of Public Enterprises has consulted -

- National Treasury;
- Department of Communications;
- Independent Communications Authority of South Africa;
- Department of Land Affairs; and
- Eskom Holdings Limited, Eskom and Transnet.

## 4. Financial implications for State

The financial implications for the State will be a capitalisation amount of R975 million into Infraco.

## 5. Parliamentary procedure

- 5.1 The State Law Advisers and the Department of Public Enterprises are of the opinion that this Bill must be dealt with in accordance with the procedure established by section 75 of the Constitution of the Republic of South Africa ("the Constitution") since it contains no provision to which the procedure set out in section 74<sup>1</sup> or 76<sup>2</sup> of the Constitution applies.
- 5.2 The State Law Advisers are of the opinion that it is not necessary to refer this Bill to the National House of Traditional Leaders in terms of section 1(1)(a) of the Traditional Leadership and Government Framework Act, 2003, (Act. No.41 of 2003), since it does not contain provisions pertaining to customary law or customs of traditional communities.

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<sup>1</sup> This section governs Bills providing for amendments to the Constitution.

<sup>2</sup> This section governs Bills affecting provinces and requires that they be referred to the National Council of Provinces,

## NOTICE 568 OF 2007

## NOTICE INVITING COMMENTS

The Minister of Public Enterprises intends to introduce the South African Express Enabling Bill 2007.

Interested persons are hereby invited to submit written comments or written representation on the draft Bill, within 30 days of the date of publication of this notice at any of the following addresses:

For attention: Ursula Nobulali Fikelepi/ Denzel Matjila  
Legal, Governance and Secretariat

Post to: Private Bag X 15  
Hatfield  
0028

Or hand delivered to: Suite 401  
InfoTech Building  
Arcadia Street  
Hatfield  
0083

Or fax to (012) 3424146

Or e-mail to: [Denzel.Matjila@dpe.gov.za](mailto:Denzel.Matjila@dpe.gov.za)

Please note that comments received after the closing date may be disregarded. Ursula / Denzel can be reached at (012) 431 1131/1194 for enquiries.

REPUBLIC OF SOUTH AFRICA

SOUTH AFRICAN EXPRESS ENABLING BILL

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*(As introduced in the National Assembly (proposed as section 75): explanatory summary of Bill published in Government Gazette No. 0000 of [insert date])*

*(The English text is the official text of the Bill)*

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(MINISTER OF PUBLIC ENTERPRISES)



## BILL

To provide for the transfer of shares, loan accounts, liabilities and guarantees from Transnet Limited in South African Express (Proprietary) Limited to the State, to provide for the conversion of South African Express (Proprietary) Limited into a public company having a share capital incorporated in terms of the Companies Act, 1961; and to provide for matters connected therewith.

### Preamble

Since retaining South African Express as a strategic asset would enable the State to preserve its ability to provide frequency of services on lower density routes;

And since the State desires to contribute to the expansion of regional air service capability within South Africa, the African continent and surrounding islands,

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

#### 1. Definitions

In this Act, unless the context otherwise indicates-

- (1) "Companies Act" means the Companies Act, 1973 (Act No. 61 of 1973);
- (2) "conversion date" means the date determined by the Minister in terms of the provisions of section 4(1);
- (3) "Legal Succession Act" means the Legal Succession to the South African Transport Services Act, 1989 (Act No.9 of 1989);
- {4} "Minister" means the Minister of Public Enterprises;
- (5) "Prescribed" means prescribed by Regulation in terms of section 8;

- (6) "PFMA" means the Public Finance Management Act, 1999 (Act No.1 of 1999);
- (7) "SAX" means South African Express (Proprietary) Limited, and with effect from the conversion date, South African Express Limited;
- (8) "SAX claims" means all amounts owing by SAX to Transnet as at midnight on the day immediately preceding the Transfer Date;
- (9) "SAX interests" means such of the SAX claims and any other assets, liabilities, rights or obligations of Transnet as are determined pursuant to section 3(1)a) or, if applicable, determined under section 3(2);
- (10) "SAX shares" means all the shares in the capital of SAX of which Transnet is, on the day preceding the transfer date, the registered and beneficial owner;
- (11) "South African Express Limited" means South African Express Limited, a public company duly incorporated in terms of the Companies Act;
- (12) "South African Express (Proprietary) Ltd" means South African Express, a private company duly incorporated in terms of the Companies Act;
- (13) "State" means the Government of the Republic of South Africa acting through the Minister;
- (14) "this Act" includes any Regulation in terms of section 8;
- (15) "transfer date" means the date on which the transfer of the shares and claims is finalised under the agreement between Transnet and the State.
- (16) "Transnet" means Transnet Limited, a company duly incorporated in terms of section 2 of the Legal Succession Act;

## 2. **Objects of Act**

The objects of this Act are to provide for-

- (a) the transfer of the SAX Shares, the SAX Interests and the SAX claims from Transnet to the State; and

- (b) the conversion of South African Express (Proprietary) Limited into a public company with share capital.

**3. Transfer of SAX shares and SAX interests**

- (1) The Minister and Transnet, with the concurrence of the Minister of Finance, must determine by agreement-
  - a) which of the SAX claims and which assets, liabilities, rights or obligations of Transnet in connection with SAX constitute the SAX interests; and
  - b) the consideration payable for the transfer of the SAX shares and the SAX interests to the State.
- (2) In the absence of an agreement between the Minister and Transnet on any matter referred to in section 3(1), that matter must be finally determined by the Minister, with the concurrence of the Minister of Finance.
- (3) With effect from the transfer date-
  - a) the State becomes the shareholder and member of SAX; and
  - b) the Minister shall exercise all of the rights attaching to the SAX shares and SAX interests, on behalf of the State, including the rights as shareholder and member of SAX.

**4. Objects and powers of SAX**

- (1) The main object of SAX is to engage in passenger airline and cargo transport services, mail, air charter and other related aviation services in South Africa, the African continent and surrounding islands.
- (2) For the purposes of section 33(1) of the Companies Act, none of the objects ancillary to the main objects of SAX are excluded.
- (3) The powers of SAX are as set out in schedule 2 to the Companies Act and none of such powers are excluded or qualified.

5. **Borrowing powers of SAX**

Subject to the PFMA, SAX may borrow money or issue a guarantee, indemnity or security, or enter into any transaction necessary to achieve its objects referred to in section 4.

6. **Conversion of South African Express (Proprietary) Limited into a public company**

- (1) After the transfer date, the Minister may on behalf of the State request the Registrar of Companies in writing to convert South African Express (Proprietary) Limited into a public company having a share capital in accordance with the Companies Act.
- (2) The request must be accompanied by the memorandum of association and articles of association of the intended company that must be -
  - (a) framed in accordance with the Companies Act, subject to this Act: and
  - (b) signed by the Minister on behalf of the State
- (3) On receipt of the request and the memorandum and articles so signed, the Registrar of Companies must -
  - (a) register the conversion of South African Express (Pty) Ltd. Into a public company having a share capital, as well as the memorandum and articles; and
  - (b) issue an amended certificate of incorporation
- (4) The name of the public company referred to in subsection (3) (a) shall be South African Express Limited
- (5) No additional fee referred to in section 63 (2) of the Companies Act is payable in respect of the registration of the memorandum and articles referred to in subsection (3) (a).
- (6) The Registrar of Companies must issue such directives and authorise such deviations from the regulations in force in terms of the Companies Act and the documents prescribed in terms thereof as he or she may consider necessary in order to give effect to this section.
- (7) Sections 32, 44(1), 54(2), 66, 190 and 344(d) of the Companies Act do not apply to South African Express Limited for so long as

the State holds 75 per cent or more of the total issued ordinary shares in the Company.

**7. Effect of conversion**

- (1) The conversion contemplated in section 6(1) does not affect-
- a) the continued corporate existence of SAX under the Companies Act;
  - b) any of the rights, liabilities or obligations acquired or incurred by SAX before the conversion date; or
  - c) the terms and conditions of service of SAX employees.

**8. Regulations**

The Minister may, by notice in the *Government Gazette*, make regulations regarding any ancillary or incidental administrative or procedural matter that it is necessary to prescribe for the proper implementation or administration of this Act.

**9. Short title and commencement**

This Act is called the South African Express Act, 2006 and comes into operation on a date determined by the President of the Republic of South Africa by proclamation in the *Gazette*.

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MEMORANDUM ON THE OBJECTS OF THE  
SOUTH AFRICAN EXPRESS BILL

1. BACKGROUND

- 1.1 In 2004 the Minister approved the disposal of non-freight assets from Transnet Limited ("Transnet") as part of Transnet's new four-point turn around strategy. The Minister of Public Enterprises has agreed with Transnet to transfer Transnet's entire shareholding, including claims in and to SAX in terms of a share sale agreement. This agreement will be subject to the fulfilment of certain suspensive conditions, which will include the passing of any legislative mandate required to implement the transfer. The SAX Bill is part of such legislative mandate.
- 1.2 The Bill provides flexibility for funding and private sector involvement as well as the possibility that SAX may be converted into a public company. Public companies are generally recognised as the optimal corporate form to access capital markets and enable future private sector investment, where necessary.

2. OBJECTS

The objects sought to be achieved through the enactment of the Bill are to provide for-

- 2.1 the transfer of the SAX shares, interests and claims from Transnet to Government;  
and
- 2.2 the conversion of SAX into a public company with share capital.

3. Bodies consulted

The Department of Public Enterprises has consulted -

- National Treasury;
- Department of Transport; and
- Transnet and SAX.

#### **4. Financial implications for State**

The financial implications for the State of the proposed statute will be through providing guarantees to various third party lenders and entities such as the International Licensing Council and replacing Transnet as the present guarantor.

#### **5. Parliamentary procedure**

5.1 The State Law Advisers and the Department of Public Enterprises are of the opinion that this Bill must be dealt with in accordance with the procedure established by section 75 of the Constitution of the Republic of South Africa ("the Constitution") since it contains no provision to which the procedure set out in section 74<sup>1</sup> or 76<sup>2</sup> of the Constitution applies.

5.2 The State Law Advisers are of the opinion that it is not necessary to refer this Bill to the National House of Traditional Leaders in terms of section 1(1)(a) of the Traditional Leadership and Government Framework Act, 2003, (Act. NO.41 of 2003), since it does not contain provisions pertaining to customary law or customs of traditional communities.

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<sup>1</sup> This section governs Bills providing for amendments to the Constitution.

<sup>2</sup> This section governs Bills affecting provinces and requires that they be referred to the National Council of Provinces.

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