

REPUBLIC OF SOUTH AFRICA

AIRPORTS COMPANY AMENDMENT BILL

*(As introduced in the National Assembly (proposed section 75); explanatory summary of
Bill published in Government Gazette No. 41120 of 15 September 2017)
(The English text is the official text of the Bill)*

(MINISTER OF TRANSPORT)

[B 5—2018]

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GENERAL EXPLANATORY NOTE:

[] Words in bold type in square brackets indicate omissions from existing enactments.

_____ Words underlined with a solid line indicate insertions in existing enactments.

BILL

To amend the Airports Company Act, 1993, so as to insert and amend certain definitions; to substitute certain expressions; to provide for the appointment and disqualification of members of the Committee; to provide for the vacation of office of members of the Committee; to provide for meetings of the Committee; to amend the period for the issuing of a permission; to provide for decisions of the Committee; to provide for the establishment of the Appeal Committee; to provide for appeals against the decisions of the Committee; to provide for the appointment and disqualification of members of the Appeal Committee; to provide for the vacation of office of members of the Appeal Committee; to provide for offences; and to provide for matters connected therewith.

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

Amendment of section 1 of Act 44 of 1993, as amended by section 17 of Act 98 of 1996 and section 1 of Act 2 of 1998

1. Section 1 of the Airports Company Act, 1993 (Act No. 44 of 1993) (hereinafter referred to as the “principal Act”), is hereby amended— 5

(a) by the insertion after the definition of “airport charge” of the following definitions:

“ **‘Air Traffic and Navigation Services Company Act’** means the Air Traffic and Navigation Services Company Act, 1993 (Act No. 45 of 1993); 10

‘Appeal Committee’ means the Appeal Committee established in terms of section 12B;

‘approach document’ means the Committee’s guidelines to the company for the submission of a permission application;” 15

(b) by the insertion after the definition of “Committee” of the following definition:

“ **‘Companies Act’** means the Companies Act, 2008 (Act No. 71 of 2008);”;

(c) by the substitution for the definition of “company” of the following definition: 20

“ **‘company’** means the Airports company established in section 2 and re-classified as a state owned company (SOC) Limited in terms of the Companies Act, subject to the applicable transitional arrangements under section 224 and Schedule 5 of the Companies Act;” 25

- (d) by the insertion after the definition of “Department” of the following definitions:
 “ **‘Director-General’** means the Director-General for the Department of Transport;
‘economic regulation’ means price controls for a company’s airport infrastructure and air navigation infrastructure;” 5
- (e) by the insertion after the definition of “permission” of the following definitions:
 “ **‘prescribed’** means prescribed by regulation;
‘Public Finance Management Act’ means the Public Finance Management Act, 1999 (Act No. 1 of 1999);” and 10
- (f) by the insertion after the definition of “Shareholding Minister” of the following definition:
 “ **‘this Act’** includes the regulations;”.

Substitution of section 4 of Act 44 of 1993 15

2. Section 4 of the principal Act is hereby substituted for the following section:

“Objects of company

4. The objects of the company are as set out in its memorandum of association [in accordance with the Companies Act, 1973 (Act No. 61 of 1973).] and includes the acquisition, establishment, development, provision, maintenance, management, control or operation of any airport or any part of any airport.”. 20

Amendment of section 5 of Act 44 of 1993, as amended by section 5 of Act 2 of 1998

3. Section 5 of the principal Act is hereby amended—
- (a) by the substitution for subsection (1) of the following subsection: 25
 “(1) The company shall have the powers of a company as contemplated in [section 34 of the Companies Act, 1973 (Act No. 61 of 1973)] section 19(1)(b) of the Companies Act, unless expressly excluded or qualified by this Act.”;
- (b) by the substitution in subsection (2) for paragraph (d) of the following paragraph: 30
 “(d) conduct its business in such a manner as to ensure that the company does not engage in any [restrictive] prohibited practices as defined in section 1 of the [Maintenance and Promotion of Competition Act, 1979 (Act No. 96 of 1979)] Competition Act, 1998 (Act No. 89 of 1998);” 35
- (c) by the substitution in subsection (2) for paragraph (f) of the following paragraph:
 “(f) publish any airport charge by notice in the *Gazette* at least [three] four months prior to the coming into operation of such charge;” 40
- (d) by the substitution in subsection (2) for paragraph (k) of the following paragraph:
 “(k) ensure that relevant activities are performed subject to section 12 (7)(b) [.]”;
- (e) by the addition in subsection (2) after paragraph (k) of the following paragraph: 45
 “(l) conduct its business and perform its functions, including the management of its revenue, expenditure, assets and liabilities, in accordance with the Public Finance Management Act.”; and
- (f) by the substitution in subsection (2A)(a) for subparagraphs (i) and (ii) of the following subparagraphs: 50
 “(i) the holding company, as [described in section 1(4) of the Companies Act, 1973 (Act No. 61 of 1973), of the Company] defined in section 1 of the Companies Act;
 (ii) a subsidiary, as [described in section 1 (3) of the Companies Act, 1973, of the company] defined in section 3 of the Companies Act; or” 55

Amendment of section 11 of Act 44 of 1993, as amended by section 11 of Act 2 of 1998

4. Section 11 of the principal Act is hereby amended—

(a) by the substitution for subsection (2) of the following subsection:

“(2) The members of the Committee shall be appointed by the Minister and shall consist of—

(a) a chairperson;

(b) a deputy chairperson; and

(c) three other persons, who are not—

(i) officers as defined in section 1 of the Public Service Act, 1994 (Proclamation No. 103 of 1994); or

(ii) persons deemed to be such officers in terms of section 1(a) of the Public Service Amendment Act, 1996 (Act No. 13 of 1996),

who, in the opinion of the Minister, are suitably qualified to perform the duties or exercise the powers of the Committee in terms of this Act and the Air Traffic and Navigation Services Company Act.”; and

(b) by the substitution for subsection (6) of the following subsection:

“(6) All administrative work in connection with the performance of the duties or the exercise of the powers of the Committee shall be done by officials in the Department designated for such purpose by the Director-General[: **Transport**].”.

Insertion of sections 11A to 11F in Act 44 of 1993

5. The following sections are hereby inserted in the principal Act after section 11:

“Appointment of members of Committee 25

11A. (1) The Minister shall, before appointing the members contemplated in section 11(2), by notice in the *Gazette* and through media, call for nominations from members of the public with interest in the civil aviation industry.

(2) The Minister shall appoint members of the Committee that—

(a) are suitably qualified and experienced in the field of law, finance, economics or the civil aviation industry;

(b) are collectively broadly representative of South African society as a whole;

(c) are committed and available to fulfil their role as members of the Committee; and

(d) shall be impartial and perform their functions without fear, favour or prejudice.

Disqualification from membership

11B. A person may not be appointed as a member or remain a member of the Committee if that person—

(a) is not a South African citizen and ordinarily resident in the Republic;

(b) is an unrehabilitated insolvent; or

(c) has at any time been convicted of an offence involving dishonesty, whether in the Republic or elsewhere, and had been sentenced to a term of imprisonment without the option of a fine, for any other offence.

Disclosure of interest

11C. (1) A member shall disclose to the Minister—

(a) any interest in any person, firm, association or company engaged in the aviation industry, acquired before or during his or her term of office;

(b) if his or her spouse, life partner or child is in the employ of, or has a professional engagement with, or has any relationship with any

person, firm, association or company engaged in the aviation industry, or has any interest in any such person, firm, association or company, acquired before or during his or her term of office.

(2) Every member shall terminate any employment relationship or professional engagement with any person, firm, association or company engaged in the aviation industry and may not take up any such employment or professional engagement during his or her term of office.

Vacation of office and termination of appointment

11D. (1) A member shall vacate his or her office if—

- (a) he or she has been declared by the High Court to be of unsound mind; 10
- (b) he or she has, without leave from the Committee, been absent for more than three consecutive meetings;
- (c) he or she resigns by written notification to the Minister;
- (d) the Minister, after consultation with the Committee, withdraws the appointment of that member because the member is incompetent or unfit to comply with the conditions of his or her appointment timeously, efficiently and diligently; or 15
- (e) he or she becomes disqualified from being a member on any of the grounds referred to in section 11B. 20

(2) The Minister may, in accordance with section 11A(2), appoint a person to fill the vacancy for the unexpired portion of the period for which that member was appointed.

Meetings of Committee

11E. (1) The Committee shall meet at such times that are necessary for the proper performance of its functions and at such place as may be determined by the chairperson. 25

(2) The Committee shall determine the procedure for conducting meetings.

(3) If the chairperson is absent from a meeting of the Committee, the deputy chairperson shall chair the meeting. 30

(4) If both the chairperson and the deputy chairperson are absent from a meeting, the members in attendance at the meeting shall elect one of the members present to chair the meeting.

(5) The quorum for any meeting of the Committee is three members.

(6) (a) A decision of the majority of the members present at a quorate meeting constitutes a decision of the Committee. 35

(b) In the event of an equality of votes on any matter, the person chairing the meeting has a casting vote in addition to his or her deliberative vote.

(7) No decision taken by the Committee is invalid if the decision was taken by the majority of those members present and entitled to vote. 40

(8) If the Committee takes a decision in any other manner other than at a formal meeting, such decision comes into effect only after it has been reduced to writing and signed by the majority of the members present, and must be submitted for noting at the first formal meeting of the Committee.

(9) The Committee must cause a record of all of its proceedings to be kept. 45

Recusal from Committee meetings

11F. A member may not be present during the discussion or making of a decision on, or take part in, any matter before the Committee in which that member or his or her spouse, life partner, child or associate has any interest.” 50

Amendment of section 12 of Act 44 of 1993, as amended by section 12 of Act 2 of 1998

6. Section 12 of the principal Act is hereby amended—

- (a) by the substitution for subsection (2) of the following subsection: 5
 “(2) Unless otherwise provided for in this Act, the company shall apply to the Committee for the issuing of a permission within the **[first three months of the third financial year]** last month of the **fourth financial year** of the period of validity of any permission held by the company in accordance with the approach document.”;
- (b) by the insertion after subsection (6) of the following subsection: 10
 “(6A) If an existing permission lapses as a result of a delay in the issuance of a new permission, the tariff of the fifth year of the permission that recently lapsed shall remain applicable until the new permission comes into effect.”;
- (c) by the deletion of subsection (8); 15
- (d) by the substitution in subsection (10) for paragraph (e) of the following paragraph:
 “(e) in respect of relevant activities, ensure that the company, after taking into consideration any compensation paid or to be paid to the company by the State in terms of the provisions of this Act or any other law, is able to finance its obligations and has a reasonable prospect of earning a commercial return **[for each financial year]** on capital employed.”; and 20
- (e) by the substitution in subsection (11) for paragraph (a) of the following paragraph: 25
 “(a) any condition mentioned in subsection (7) in respect of **[the last two financial years of the period of validity of]** a permission mentioned in subsection (2), if the Minister approves such amendment;”.

Insertion of sections 12A to 12I in Act 44 of 1993 30

7. The following sections are hereby inserted in the principal Act after section 12:

“Decisions of Committee

- 12A.** (1) Every decision of the Committee shall be in writing and shall be— 35
- (a) consistent with the Constitution and all applicable laws;
- (b) in the interest of the civil aviation industry and the South African economy;
- (c) taken in an open, transparent and fair manner and process, in which affected persons have the opportunity to submit their views and present relevant facts and evidence to the Committee; 40
- (d) based on reasons, facts and evidence that shall be summarised and recorded; and
- (e) explained clearly as to its factual and legal basis and the reasons therefor.
- (2) Any decision of the Committee and the reasons therefor shall be available to any affected party, except information that is protected in terms of the Protection of Personal Information Act, 2013 (Act No. 4 of 2013). 45

Establishment of Appeal Committee

- 12B.** (1) There is hereby established an Appeal Committee.
- (2) The members of the Appeal Committee shall be appointed by the Minister and shall consist of— 50
- (a) a chairperson;
- (b) a deputy chairperson; and
- (c) three other persons, of whom at least two are not— 55
- (i) officers as defined in terms of section 1 of the Public Service Act, 1994 (Proclamation No. 103 of 1994); or

(ii) persons deemed to be such officers in terms of section 1(a) of the Public Service Amendment Act, 1996 (Act No.13 of 1996).

(3) The Appeal Committee shall be impartial and perform its functions without fear, favour or prejudice.

(4) If the chairperson is for any reason unable to perform his or her functions, the deputy chairperson shall perform them until the chairperson is able to resume his or her functions or, in the event that the chairperson is unable to do so, the Minister shall designate another chairperson.

(5) The members of the Appeal Committee shall be appointed on a part-time basis.

(6) A member of the Appeal Committee shall hold office for a period determined by the Minister.

(7) The Appeal Committee shall convene as and when required by the Minister.

Appointment and disqualification of members of Appeal Committee

12C. (1) The Minister shall, before appointing the members contemplated in section 12B, by notice in the *Gazette* and through media, call for nominations from members of the public.

(2) A member of the Appeal Committee shall be—

- (a) suitably qualified and experienced in the field of law, finance, economics and the civil aviation industry;
- (b) collectively broadly representative of the South African society as a whole;
- (c) committed and available to fulfil the role as member of the Appeal Committee; and
- (d) impartial and perform his or her functions without fear, favour or prejudice.

(3) A person may not be appointed as, or remain, a member of the Appeal Committee if that person—

- (a) is not a South African citizen and ordinarily resident in the Republic;
- (b) is an unrehabilitated insolvent; or
- (c) has at any time been convicted of an offence involving dishonesty, whether in the Republic or elsewhere, and has been sentenced to a term of imprisonment without the option of a fine for any other offence.

Remuneration of members of Appeal Committee

12D. The members of the Appeal Committee shall receive such remuneration, allowances and benefits as the Minister may determine with the concurrence of the Minister of Finance.

Disclosure of interest

12E. (1) A member shall disclose to the Minister—

- (a) any interest in any person, firm, association or company engaged in the aviation industry, acquired before or during that member's term of office; and
- (b) if that member's spouse, life partner or child is in the employ of, or acts as a consultant to, or has any relationship with any person, firm, association or company engaged in the aviation industry, or has any pecuniary interest in any such person, firm, association or company, acquired before or during that member's term of office.

(2) The administrative functions in connection with the performance of the functions or the exercise of the powers of the Appeal Committee may be done by the officers in the Department, designated for such purpose by the Director-General.

Vacation of office and termination of appointment of members of Appeal Committee

- 12F.** (1) A member of the Appeal Committee shall vacate his or her office if that member—
- (a) has been declared by the High Court to be of unsound mind;
 - (b) resigns by written notification to the Minister;
 - (c) fails to comply with the conditions of his or her appointment efficiently and diligently; or
 - (d) becomes disqualified from being a member on any of the grounds referred to in section 12C(3).

Appeals

- 12G.** (1) The company or a person who has a substantial interest in the decision of the Committee to grant or refuse a written permission in terms of section 12 of this Act or any other decision related to economic regulation, may appeal, in writing, on a prescribed form against such decision to the Appeal Committee.
- (2) An appeal in terms of subsection (1) must be submitted to the Appeal Committee within 30 days after the date on which the Committee made the decision.
- (3) The Appeal Committee may, at any time, permit the company or a person to lodge an appeal after the period of 30 days has expired, if the Appeal Committee is satisfied, after having considered all the relevant circumstances, that good cause is shown by the company or such person for failing to comply with the applicable timeframes.
- (4) The Appeal Committee shall hear and determine an appeal within 90 days after the appeal has been lodged and inform the appellant of the outcome in writing.

Procedure for hearing of appeals

- 12H.** (1) The Appeal Committee shall determine the procedure for the hearing of an appeal.
- (2) An appeal shall be heard at the time and place determined by the Appeal Committee.
- (3) The chairperson shall, at least 14 days before the hearing of an appeal, notify the company and any person who may be affected by the appeal, or who may have an interest in the outcome of the appeal, in writing, of the date, time and place of the appeal.
- (4) The chairperson may, for the purpose of hearing an appeal—
- (a) summon any person as a witness;
 - (b) administer an oath or accept an affirmation from any person called as a witness at the hearing; and
 - (c) call any person present at the hearing as a witness and interrogate him or her, and require him or her to produce any book, document or object in his or her possession or custody or under his or her control.
- (5) A summon for the attendance of a witness or for the production of any book, document or object before the Appeal Committee shall be signed by the chairperson and issued in a form determined by the Appeal Committee.
- (6) The appellant, as well as the respondent, may be represented by a legal practitioner at the hearing of an appeal.

Decisions of Appeal Committee

- 12I.** (1) The Appeal Committee may, after hearing an appeal—
- (a) confirm the decision;
 - (b) set aside the decision; or
 - (c) refer the decision back to the Committee to be reconsidered.
- (2) The decision of the majority of the members of the Appeal Committee shall be the decision of the Appeal Committee.

(3) The decision of the Appeal Committee shall be in writing, and a copy thereof shall be furnished to the appellant and the respondent within 30 days of the hearing of the appeal, unless the chairperson, in his or her discretion, determines otherwise, after taking into account submissions from the parties in relation to the—

- (a) complexity of the issues to be decided;
- (b) prolixity of documents to be considered; and
- (c) importance of the issues to be decided.

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Amendment of section 14 of Act 44 of 1993, as amended by section 15 of Act 2 of 1998

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8. Section 14 of the principal Act is hereby amended by the substitution for subsection (1) of the following subsection:

“(1) Any person who [**feels**] is aggrieved by the failure of the company to comply with any provision of section 5(2) or 12(1) or (12), may lodge with the Committee a complaint, in writing, on the prescribed form, which shall be accompanied by proof of the failure.”.

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Insertion of section 14A in Act 44 of 1993

9. The following section is hereby inserted in the principal Act after section 14:

“Offences and penalties

14A. (1) Any person who wilfully interrupts the proceedings of the Appeal Committee or who wilfully hinders or obstructs the Appeal Committee in the performance of its functions, shall be guilty of an offence and liable on conviction to a fine or to imprisonment not exceeding five years or to both a fine and such imprisonment.

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(2) Any person who—

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(a) is summoned to appear before the Appeal Committee to give evidence or to produce any book, document or object before the Appeal Committee and who, without sufficient cause, fails or refuses to—

(i) attend the proceedings at the time and place specified in the summons, or to remain in attendance until the conclusion of the appeal;

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(ii) remain in attendance until he or she is excused by the chairperson of the Appeal Committee from further attendance; or

(iii) be sworn in or to make an affirmation as a witness after he or she has been required by the chairperson of the Appeal Committee to do so; or

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(b) having been sworn in or having made an affirmation, fails to answer fully and satisfactorily any question lawfully put to him or her, or fails to produce any book, document or object in his or her possession or custody or under his or her control, which he or she has been summoned to produce,

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shall be guilty of an offence and liable on conviction to a fine or to imprisonment not exceeding five years, or to both a fine and such imprisonment.

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(3) Any person who, after having been sworn in or having made an affirmation, gives false evidence before the Appeal Committee on any matter, knowing such evidence to be false or not knowing or believing it to be true, shall be guilty of an offence and liable on conviction to a fine or to imprisonment not exceeding five years, or to both a fine and such imprisonment.”.

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Amendment of section 15 of Act 44 of 1993, as amended by section 16 of Act No. 2 of 1998

10. Section 15 of the principal Act is hereby amended—

- (a) by the substitution in subsection (1) for the words preceding paragraph (a) of the following words:

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- “The Minister may, by notice in the *Gazette*, make regulations—”;
- (b) by the insertion in subsection (1), after paragraph (cB), of the following paragraphs:
- “(cC) after consultation with the Committee, regarding any matter related to economic regulation; 5
- (cD) after consultation with the Committee, regarding procedures to be followed by the Committee to enforce compliance by the company; 10
- (cE) after consultation with the Committee, regarding the manner and form to be used to lodge a complaint with the Committee against the company for failing to comply with any provision of section 5(2), 12(1) or (12); 10
- (cF) regarding the manner and form to be used to lodge an appeal with the Appeal Committee against the decision of the Committee to grant or refuse a written permission in terms of section 12 or any other decision related to economic regulation;” and 15
- (c) by the substitution for subsection (2) of the following subsection:
- “(2) A regulation under subsection (1) may, for any contravention thereof or failure to comply therewith, prescribe a penalty of a fine or imprisonment for a period not exceeding [six months] five years or of both a fine and such imprisonment.” 20

Amendment of long title of Act 44 of 1993

11. The long title of the principal Act is hereby substituted for the following long title:

“To provide for the establishment of a [public] company and the transfer of the State’s shares in the company; to regulate certain activities at company airports; to provide for the appointment and disqualification of members of the Committee; to provide for the vacation of office of members of the Committee; to provide for the meetings of the Committee; to provide for the establishment of the Appeal Committee; to provide for the appointment and disqualification of members of the Appeal Committee; to provide for the vacation of office of members of the Appeal Committee; to provide for offences and penalties; and to provide for matters connected therewith.” 25 30

Substitution of certain citations and expressions in Act 44 of 1993

12. The principal Act is hereby amended— 35
- (a) by the substitution for the citation “Maintenance and Promotion of Competition Act, 1979 (Act No. 96 of 1979)”, wherever it occurs, of the citation “Competition Act, 1998 (Act No. 89 of 1998)”;
- (b) by the substitution for the expression “Minister of Safety and Security”, wherever it occurs, of the expression “Minister responsible for Police”; and 40
- (c) by the substitution for the expression “Minister of Finance”, wherever it occurs, of the expression “Minister responsible for Finance”.

Short title and commencement

13. This Act is called the Airports Company Amendment Act, 2018, and comes into operation on a date fixed by the President by proclamation in the *Gazette*. 45

MEMORANDUM ON THE OBJECTS OF THE AIRPORTS COMPANY AMENDMENT BILL, 2018

1. BACKGROUND

- 1.1 The Airports Company Amendment Bill, 2018 (“the Bill”) seeks to amend the Airports Company Act, 1993 (Act No. 44 of 1993) (“the principal Act”) thereby strengthening the current economic regulatory framework. The Department of Transport (“the Department”), under the Branch: Civil Aviation, established a Project Team consisting of the following stakeholders who are directly affected by the amendments; the Regulating Committee (“the Committee”), Airports Company South Africa (ACSA), Air Traffic and Navigation Services (ATNS), Board of Airlines Representative of South Africa (BARSA) and the Airlines Association of Southern Africa (AASA).
- 1.2 The review of the principal Act will, among other things, (i) address the lack of an effective appeal mechanisms; (ii) give the approach document legal status; (iii) address the lack of clarity regarding the reasons for regulatory decisions (especially from the Regulating Committee); (iv) prescribe the procedure the Minister must follow when appointing members of the Committee and Appeal Committee; (v) empower the Minister to make regulations regarding matters related to economic regulation and the procedure to be followed by the Committee regarding non-compliance by the Company.

2. PURPOSE OF BILL

The purpose of the Bill is to amend the principal Act thereby aligning the principal Act with the Companies Act, 2008 (Act No. 71 of 2008), the Competition Act, 1998 (Act No. 89 of 1998) and the Public Finance Management Act, 1999 (Act No. 1 of 1999); to insert, delete and amend certain definitions (e.g. the inclusion of the definition of “approach document” in order to give legal status to the approach document); to provide for the appointment and disqualification of members of the Committee; to provide for the vacation of office of members of the Committee; to provide for the meetings of the Committee; to provide for the establishment of the Appeal Committee; to provide for the appointment and disqualification of members of the Appeal Committee; to provide for the vacation of office of members of the Appeal Committee, to provide for offences and penalties and to provide for matters connected therewith.

3. OBJECTS OF BILL

The Bill introduces the amendments as follows:

- 3.1 **Clause 1** of the Bill amends section 1 of the principal Act by inserting certain definitions i.e. Air Traffic and Navigation Services Company Act; Appeal Committee; approach document; Companies Act; Company; Director-General and economic regulation amongst others. The insertion of these definitions will assist with a better understanding of the principal Act.
- 3.2 **Clause 2** of the Bill amends section 4 of the principal Act by listing the objects of the company as contained in the current memorandum of association. The intention is for the listed objectives also to be contained in the principal Act for ease of reference by the user.
- 3.3 **Clause 3** of the Bill amends section 5 of the principal Act so as to align subsection (1) with section 19(1)(b) of the Companies Act, 2008. Clause 3 also amends subsection (2)(d) by aligning the principal Act with the Competition Act, 1998. In addition, section 2(f) of the principal Act is amended by replacing the word “**three**” with the word “**four**”. The period of publishing any airport charge by the company is extended by a month prior to that charge coming into operation. The reason for this amendment is to allow the users of airport infrastructure, particularly the airlines and other operators

directly affected by the new tariffs, sufficient time to prepare for the implementation of the new tariffs as issued by the Committee. Furthermore, clause 3 provides for an additional subsection 2(l) which provides for the functions of the Company.

- 3.4 **Clause 4** of the Bill amends section 11 of the principal Act by replacing the original composition of the Committee. The members will be appointed by the Minister and consist of a chairperson, deputy chairperson and three other members. We have included a definition for “Director-General”, therefore, section 11(6) of the principal Act is a consequential amendment as a result of the inclusion of the definition for Director-General.
- 3.5 **Clause 5** of the Bill inserts sections *11A, B, C, D, E and F* into the principal Act:
- (a) Section 11A provides for the appointment of members of the Committee by the Minister. The Minister may call for nominations using the *Gazette* and other media platforms. The criteria for appointment is that a member must be suitably qualified and experienced in the field of law, finance, economics or the civil aviation industry. In addition, members must be collectively and broadly representative of South African society as a whole. Members must be committed and available to fulfil their role and must be impartial and perform their functions without fear, favour or prejudice.
 - (b) Section 11B provides for disqualification from membership. Section 11C provides for disclosure of interest and provides when a member must disclose his or her interest to the Minister. Section 11D provides when a member must vacate his or her office and a member’s termination of office.
 - (c) Section 11E provides for the meetings of the Committee; procedure for meetings, what will constitute a quorum and what will constitute a decision. Section 11F provides for instances when a member must recuse himself or herself from meetings.
- 3.6 **Clause 6** of the Bill amends section 12 of the principal Act by extending the period of amendment of the conditions of the permission and also giving the approach document a legal status:
- (a) Section 12(6A) is also inserted into the principal Act to remedy a situation whereby when an existing permission lapses due to the delay in the issuance of a new one so that the company (ACSA) can continue levying airport tariffs.
 - (b) Section 12(10)(e) of the principal Act is amended by deleting the words “**for each financial year**”. Section 12(11)(a) is amended by deleting the words “**the last financial years of the period of validity of**” because the company’s permission will now be allowed to run for full five years without amending the last two years of the existing permission.
- 3.7 **Clause 7** of the Bill inserts sections 12A, B, C, D, E, F, G, H and I into the principal Act:
- (a) Section 12A provides for decisions of the Committee and that every decision must be in writing and consistent with the Constitution and in the interest of the industry. The decisions made by the Committee and reasons must be available to any affected person subject to applicable legislation.
 - (b) Section 12B provides for the establishment of the Appeal Committee. The Appeal Committee will consist of five members. The members will be appointed as part time members by the Minister. The Appeal Committee will convene at the request of the Minister. Section 12C provides for the process of appointment and disqualification of members.
 - (c) Section 12D provides that the Minister with the concurrence of the Minister of Finance, will determine the remuneration for members of the Appeal Committee.

- (d) Section 12E provides for when a member of the Appeal Committee must declare his or her interest. Section 12F provides for the process of vacating office and termination of appointment.
- (e) Sections 12G; H and I provide for lodging an appeal, procedure at the hearing of an appeal and decisions that may be made by the Appeal Committee, respectively.

- 3.8 **Clause 8** of the Bill amends section 14 of the principal Act and provides for any person who is aggrieved by the failure of the company to comply with provisions in terms of the Act, to lodge a complaint in the prescribed form thereby standardising the complaints procedure and lessening the possible administrative burden associated with a complaint process.
- 3.9 **Clause 9** of the Bill inserts section 14A into the principal Act to deal with offences and penalties, whereby any person, amongst other things, who wilfully disrupts proceedings, fails to attend the hearing as summoned by the Appeal Committee, fails to satisfactorily answer the questions put to him or her and any person, after being sworn or having made affirmation, gives false evidence will be guilty of an offence.
- 3.10 **Clause 10** of the Bill amends section 15 of the principal Act by empowering the Minister to make regulations by notice in the *Gazette* after consultation with the Committee and the aviation industry regarding any matter related to economic regulation of the aviation industry. It also permits the regulating of prescribed forms for lodging appeals and complaints. Furthermore, section 15(2) is amended to provide for the Minister to impose a longer period of imprisonment applicable to any regulation under subsection (1).
- 3.11 **Clause 11** of the Bill amends the long title of the principal Act and is therefore a consequential amendment.
- 3.12 **Clause 12** of the Bill amends certain citations and expressions that are used in the principal Act i.e. reference to the repealed Maintenance and Promotion of Competition Act, 1979 (Act No. 96 of 1979), and the expression “Minister of Safety and Security” with “Minister responsible for Police”.
- 3.13 **Clause 13** of the Bill contains the short title of the Amendment Act and provides for the commencement of the Amendment Act which will be on a date fixed by the President by Proclamation.

4. CONSULTATION

The draft Bill was published in the *Gazette* for public comments on 2 December 2014 (*Gazette* No. 38279, Vol 594). The following stakeholders were consulted:

- The aviation industry stakeholders who were part of the Project Team, including:
 - Regulating Committee;
 - ACSA;
 - ATNS;
 - BARSAs; and
 - AASA.
- The Project Team of Single Transport Economic Regulator.

5. FINANCIAL IMPLICATION FOR STATE

The financial implications for the State include, among others, the costs that the Department will incur when appointing members of the Appeal Committee, remuneration of members of the Appeal Committee and the provision of administrative and secretariat support by the Department to the Appeal Committee.

6. PARLIAMENTARY PROCEDURE

- 6.1 The State Law Advisers and the Department are of the opinion that this Bill should be dealt with in terms of the procedure prescribed by the provisions of Section 75 of the Constitution since it contains no provision to which the procedure set out in Section 74 or 76 of the Constitution applies.
- 6.2 The opinion of the State Law Adviser is as follows:
- (a) The principles in the case of *Tongoane and Others versus National Minister for Agriculture and Land Affairs and Others 2010 (8) BCLR 741 (CC)* (the “*Tongoane case*”) is important when determining if a Bill ought to be tagged as either a section 75 or 76 Bill. The test for determining the procedure to be followed in enacting a Bill is whether the provisions of the Bill, in substantial measure, fall within a functional area listed in Schedule 4 of the Constitution.
 - (b) The tagging of the Bill requires firstly, considering all the provisions of the Bill as opposed to a single provision in the Bill and, thereafter, employing the term “substantially” when considering the impact of these provisions on the provinces. When considering if the Bill substantially affects the provinces or not, this must be done in accordance with an assessment of all the relevant provisions of the Bill and thereafter a consideration of whether or not the impact of these provisions is not so small as to be regarded as trivial.
 - (c) Other key points to consider as stated in the *Tongoane case* are as follows:
 - (i) The tagging of Bills before Parliament must be informed by the need to ensure that provinces fully and effectively exercise their appropriate role in the process of considering national legislation that substantially affects them. Paying less attention to the provisions of a Bill once its substance, or purpose and effect, have been identified, undermines the role that provinces should play in the enactment of national legislation affecting them.
 - (ii) To apply the “pith and substance” test to the tagging question, therefore undermines the constitutional role of the provinces in legislation in which they should have a meaningful say, and disregards the breadth of the legislative provisions that section 76(3) of the Constitution requires to be enacted in accordance with the section 76 procedure.
 - (d) If we have to take into consideration the legal principles expounded by the *Tongoane case*, the following may be deduced from a reading of this Bill:
 - (i) The purpose of this Bill is to give legal status to the approach document which is a document that will be used by the Committee to provide guidelines to ACSA on how to submit permission applications. The Bill also provides for an effective appeal mechanism against the Committee’s decisions. It further attempts to strengthen the powers of the Committee by providing for procedures relating to conduct and appointment of members. These matters relate to the functioning of the ACSA and the Committee by ensuring greater transparency and accountability measures. The additional functions affect the ACSA and the Committee as national structures and do not affect the provinces in any substantial measure.
 - (ii) The most significant point, other than a consideration of the purpose of the Bill, is that in terms of Section 44(1)(a)(ii) of the Constitution, the national legislative authority has concurrent competence with a provincial legislative authority within a functional area listed in Schedule 4. The functional area “airports” is not listed in either schedule 4 or 5 of the Constitution. “Airports other than international and national airports” is, however, listed in Part A of Schedule 4 of the Constitution which is therefore a functional area of national and provincial legislative competence.

- (iii) The State Law Advisers and the Department's view is that the Bill, relates to both international and national Airports within South Africa and, therefore, this Bill does not fall within the ambit of Part A of Schedule 4 of the Constitution as an area of concurrent national and provincial legislative competence.
- (iv) It would seem that the Bill, in its current form, would not, in substantial measure, fall within a functional area listed in Schedule 4 or substantially affect the provinces. These provisions do not appear to affect the interests of the province, since they do not impose a function or duty on the provinces. The ACSA retains control and management of the functions as listed in the principal Act and the Minister is responsible for the appointment of the Appeal Committee and the Committee members in accordance with the proposed amendments. The Bill should be dealt with in terms of section 75 of the Constitution.

6.3 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 18(1)(a) of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003), since it does not contain provisions pertaining to customary law or customs of traditional communities. This is also a view of the Department.