REPUBLIC OF SOUTH AFRICA

# AIR TRAFFIC AND NAVIGATION SERVICES COMPANY AMENDMENT BILL

*(As amended by the Portfolio Committee on Transport (National Assembly))*
*(The English text is the official text of the Bill)*

(MINISTER OF TRANSPORT)

**[B 6B—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 Air Traffic and Navigation Services Company Act, 1993, so as to insert new definitions; to provide for a subsidiary to perform functions inside and outside of the Republic; to provide for appeals against the decisions of the Committee; to provide for offences and penalties; to substitute certain expressions, citations and words; 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 45 of 1993, as amended by section 19 of Act 98 of 1996**

**1.** Section 1 of the Air Traffic and Navigation Services Company Act, 1993 (Act No. 45 of 1993) (hereinafter referred to as the ''principal Act''), is hereby amended—

*(a)* by the insertion after the definition of ''air navigation service'' of the following definition:

'' **'Airports Company Act'** means the Airports Company Act, 1993 (Act No. 44 of 1993);'';

*(b)* by the insertion after the definition of ''air traffic service charge'' of the following definitions:

'' **'Appeal Committee'** means the Appeal Committee established by section 12B of the Airports Company Act;

**'approach document'** has the meaning assigned to it in the Airports Company Act;

**'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:

'' **'company'** means the Air Traffic and Navigation Services Company, established in terms of section 2;'';

*(d)* by the insertion after the definition of ''Department'' of the following definition:

'' **'economic regulation'** has the meaning assigned to it in the Airports Company Act;'';

*(e)* by the insertion after the definition of ''permission'' of the following definitions:

" **'prescribed'** means prescribed by regulation;
**'relevant activity'** means the provision of any service or facility for the purposes of air traffic management, communication, surveillance, operation, control or maintenance of air navigation infrastructure and air traffic services within the borders of the Republic;";

*(f)* by the substitution for the definition of "Shareholding Minister" of the following definition:

" **'Shareholding Minister'** means the Minister **[mentioned]** designated in terms of section **[3(3)]** 3(4);"; and

*(g)* by the insertion after the definition of "Shareholding Minister" of the following definitions:

" **'subsidiary'** has the meaning assigned to it in section 1 of the Companies Act;
**'this Act'** includes the regulations.".

**Amendment of section 2 of Act 45 of 1993**

**2.** Section 2 of the principal Act is hereby amended—

*(a)* by the substitution for the heading of the following heading:
**"Establishment and classification of company"**;

*(b)* by the substitution for subsection (1) of the following subsection:
"(1) On a date to be fixed by the Minister by notice in the *Gazette* there shall be established a **[public]** company to be known as the Air Traffic and Navigation Services Company Limited.";

*(c)* by the deletion of subsection (6);

*(d)* by the substitution in subsection (7) for paragraph *(c)* of the following paragraph:
"*(c)* The majority of the non-executive directors shall be persons who are not **[officers or]** employees **[as defined in section 1]** in terms of the Public Service Act, **[1984 (Act No. 111 of 1984)]** 1994 (Proclamation 103 of 1994).";

*(e)* by the addition, after subsection (7), of the following subsection:
"(8) As from the date of commencement of the Companies Act, the company is classified as a state-owned company listed under Schedule 2 of the Public Finance Management Act, 1999 (Act No. 1 of 1999), subject to the applicable transitional arrangements under section 224 and Schedule 5 of the Companies Act.".

**Amendment of section 5 of Act 45 of 1993**

**3.** Section 5 of the principal Act is hereby amended—

*(a)* by the substitution in subsection (2) for paragraph *(d)* of the following paragraph:
"*(d)* conduct its business in such a manner as to ensure that the company does not engage in any **[restrictive]** prohibited practice, 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);";

*(b)* by the substitution in subsection (2) for paragraph *(e)* of the following paragraph:
"*(e)* not change the level or modify the structure of any air traffic service charge more than twice within a financial year;" **[and]**

*(c)* by the substitution in subsection (2) for paragraph *(f)* of the following paragraph:
"*(f)* publish by notice in the *Gazette* any air traffic service charge at least **[three]** four months prior to the coming into operation of such charge**[.]**;";

*(d)* by the addition in subsection (2) after paragraph *(f)* of the following paragraphs:
"*(g)* with the exception of a relevant activity, ensure that any other service inside or outside of the Republic, of which the tariffs are not determined by the Committee, is provided by a subsidiary of the company; and

*(h)* with the exception of a relevant activity, perform any other service in a manner that will not substantially or adversely affect the performance of any relevant activity or expose any relevant activity to substantial financial risks.''; and

*(e)* by the substitution for subsection (3) of the following subsection:

''(3) The company may, in order to perform its functions or attain any of its objects, with the approval of the Shareholding Minister and the Minister responsible for Finance—

*(a)* raise money by way of loans from any source; or

*(b)* receive income from sources, other than air traffic service charges, and enforce any contract providing for such raise or receipt of income with the approval of the Shareholding Minister and the Minister responsible for Finance.''.

**Amendment of section 11 of Act 45 of 1993**

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

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

''(2) Unless otherwise provided for in this Act, the company shall apply to the Committee for the issuing of a permission, **[at the beginning of the third financial year]** within the 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:

''(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);

*(d)* by the substitution in subsection (10) for paragraph *(e)* of the following paragraph:

''*(e)* 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 have a reasonable prospect of earning a commercial return on capital employed.''; and

*(e)* by the substitution for subsection (11) of the following subsection:

''(11) Subject to the Minister's approval, the Committee may, after consultation with the company and other interested parties, amend—

*(a)* any condition contemplated in subsection (7) in respect of a permission contemplated in subsection (2); and

*(b)* any condition contemplated in subsection (7), other than a condition contemplated in paragraph *(a)*.''.

**Insertion of sections 11A to 11C in Act 45 of 1993**

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

''**Appeals**

**11A.** (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 11 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) shall 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**

**11B.** (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 summons 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**

**11C.** (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—

*(a)* the complexity of the issues to be decided;

*(b)* the volume of documents to be considered; and

*(c)* the importance of the issues to be decided.''.

**Amendment of section 13 of Act 45 of 1993**

**6.** Section 13 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 11(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.''.

**Insertion of section 13A in Act 45 of 1993**

**7.** The following section is hereby inserted in the principal Act after section 13:

''**Offences and penalties**

**13A.** (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 such fine and such imprisonment.

(2) Any person who—

*(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;

(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

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

(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.''.

**Amendment of section 14 of Act 45 of 1993**

**8.** Section 14 of the principal Act is hereby amended—

*(a)* by the substitution for subsection (1) of the following subsection:

''(1) The Minister may, by notice in the *Gazette*, make regulations—

*(a)* after consultation with the Minister responsible for Police, regarding security arrangements in respect of air navigation infrastructures;

*(b)* after consultation with the Committee, regarding any matter related to economic regulation;

*(c)* after consultation with the Committee, regarding procedures to be followed by the Committee to enforce compliance by the company;

*(d)* after consultation with the Committee, regarding the form to be used and the manner in which to lodge a complaint with the Committee against the company for failing to comply with any provision of section 5(2) or 11(1) or (12);

*(e)* regarding the form to be used and the manner in which 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 11 or any other decision related to economic regulation;

*(f)* regarding any matter which, in terms of this Act, is permitted or required to be prescribed; and

*(g)* regarding any other matter the regulation of which may, in the opinion of the Minister, be necessary or desirable in order to achieve or promote the objects of this Act.''; and

*(b)* 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.''.

**Amendment of long title of Act 45 of 1993**

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

"**To provide for the transfer of certain assets and functions of the State to a public company to be established; to provide for the provision of services by the company outside of the Republic; to provide for appeals against the decisions of the Committee; to provide for offences and penalties; and to provide for matters connected therewith.**".

**Substitution of certain expressions, citations and words in Act 45 of 1993**

**10.** The principal Act is hereby amended—

*(a)* by the substitution for the expression "Minister of Law and Order", wherever it occurs, of the expression "Minister responsible for Police";

*(b)* by the substitution for the expression "Minister of State Expenditure", wherever it occurs, of the expression "Minister responsible for Finance";

*(c)* by the substitution for the expression "Minister of Finance", wherever it occurs, of the expression "Minister responsible for Finance";

*(d)* by the substitution for the citation "Civil Aviation Offences Act, 1972 (Act No. 10 of 1972)", wherever it occurs, except in section 17 of the Act, of the citation "Civil Aviation Act, 2009 (Act No. 13 of 2009)";

*(e)* by the substitution for the citation "Public Service Act, 1984 (Act No.111 of 1984)", wherever it occurs, of the citation "Public Service Act, 1994 (Proclamation No. 103 of 1994)"; and

*(f)* by the substitution for the expression "State President", wherever it occurs, of the expression "President".".

**Short title and commencement**

**11.** This Act is called the Air Traffic and Navigation Services Company Amendment Act, 2019, and comes into operation on a date fixed by the President by Proclamation in the *Gazette*.

# MEMORANDUM ON THE OBJECTS OF THE AIR TRAFFIC AND NAVIGATION SERVICES COMPANY AMENDMENT BILL, 2019

## 1. BACKGROUND

1.1 The Air Traffic and Navigation Services Company Amendment Bill, 2018 (the ''Bill'') seeks to amend the Air Traffic and Navigation Services Company Act, 1993 (Act No. 45 of 1993) (the ''principal Act'') to strengthen 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:
(a) The Committee,
(b) Airports Company South Africa (''ACSA'');
(c) The Air Traffic and Navigation Services Company (''ATNSC'');
(d) The Board of Airlines Representative of South Africa (''BARSA''); and
(e) The Airlines Association of Southern Africa (''AASA'').

1.2 The intention to review the principal Act was to, among others—
(a) address the lack of effective appeal mechanisms without recourse to the legal system;
(b) give legal status to the approach document;
(c) address the lack of clarity regarding the reasons for regulatory decisions, especially from the Committee;
(d) empower the ATNS to provide services outside of the Republic through a subsidiary; and
(e) empower the Minister to make regulations regarding any matter related to economic regulation and procedures to be followed by the Committee on non-compliance by the Company.

## 2. PURPOSE OF BILL

The Bill seeks to amend the principal Act to—
(a) give legal status to the approach document, which is a document in which the Committee provides guidelines to be followed by the ATNS and the ACSA in submitting permission applications;
(b) provide for the procedure for meetings and decisions of the Committee to ensure the transparency, flexibility and predictability of regulatory decisions; and
(c) provide for effective appeals mechanisms where the ATNS or any aggrieved person may appeal against the decisions of the Committee.

## 3. OBJECTS OF BILL

3.1 **Clause 1** of the Bill amends section 1 of the principal Act by inserting definitions of the following expressions that were not defined in the principal Act, namely:
(a) 'Airports Company Act';
(b) 'Appeal Committee';
(c) 'approach document';
(d) 'economic regulation';
(e) 'prescribed';
(f) 'relevant activity';
(g) 'subsidiary'; and
(h) 'this Act'.

3.1.1 Clause 1 further amends the definition of ''company'' and ''Shareholding Minister''.

3.2 **Clause 2** of the Bill amends section 2 of the principal Act to align the principal Act with the Companies Act, 2008 (Act No. 71 of 2008), by deleting references to the provisions of the repealed Companies Act.

3.3 **Clause 3** of the Bill amends section 5(2)*(d)* of the principal Act by providing for the ATNS to conduct its business in such a way that it does not engage in any prohibited practice, as defined in section 1 of the Competition Act, 1998 (Act No. 89 of 1998).

3.3.1 This clause further amends section 5(2)*(f)* of the principal Act to extend any air traffic service charge by a month prior to that charge coming into operation. The reason for this amendment is to extend the notice period of gazetting new tariffs, from three months to four months, in order to afford the users of air navigation service infrastructure sufficient time (i.e. one month longer) to prepare for the new tariffs.

3.3.2 Clause 3 inserts paragraph *(g)* into section 5(2) of the principal Act to provide that the ATNS shall ensure that, with the exception of a relevant activity, a subsidiary of the ATNS must provide services, of which the tariffs are not determined by the Committee, inside or outside of the Republic.

3.3.3 Furthermore, clause 3 inserts paragraph *(h)* into section 5(2) of the principal Act to ensure that when the ATNS performs any activity or provides any services other than a relevant activity (through its subsidiary), the ATNS shall do so in a manner that will not substantially or adversely expose the core business or relevant activities to financial risks.

3.3.4 Clause 3 further amends section 5(3) of the principal Act to empower the ATNS to venture into other businesses to increase its revenue from sources other than air traffic service charges or relevant activities. This clause supports the proposed new section 5(2)*(g)*, which encourages the ATNS not to only rely on income from air traffic services or relevant activities.

3.4 **Clause 4** of the Bill amends section 11 of the principal Act by extending the period of amendment of the conditions of a permission and by giving legal status to the approach document.

3.4.1 This clause further inserts a new subsection (6A) into section 11 of the principal Act, to remedy a situation whereby an existing permission lapses due to the delay in the issuance of a new permission. In this case, the tariff of the fifth year of the permission that recently lapsed will remain applicable until the new permission comes into effect, to ensure that the ATNS can continue levying airport tariffs. This is in line with the provisions in the Airports Company Amendment Bill, 2019, since the two Acts are interlinked.

3.4.2 Clause 4 further deletes section 11(8) because the intention is to eliminate the confusion caused by the overlapping of permissions when the conditions in respect of the last two financial years of the existing permission are amended with the conditions of the first two years of the newly approved permission. This is addressed by allowing the permission to remain in force for the full five years, without being amended.

3.4.3 Clause 4 further amends section 11(11) of the principal Act to empower the Committee, after consultation with the ATNS and with the approval of the Minister of Transport (''Minister''), to amend the conditions of a permission.

3.5 **Clause 5** of the Bill inserts new sections 11A to 11C into the principal Act that provide for the appeals mechanism (including the procedure for the hearing of appeals and the decisions of the Appeal Committee), where the ATNS or any aggrieved person may appeal against a decision of the Committee.

3.6 **Clause 6** of the Bill amends section 13 of the principal Act by allowing for the manner in which an aggrieved person or the company may lodge an appeal with the Appeal Committee (i.e. in writing, on the prescribed form).

3.7 **Clause 7** inserts section 13A into the principal Act, which provides for offences and penalties, whereby any person 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 in or having made affirmation, gives false evidence, is guilty of an offence and is penalised accordingly.

3.8 **Clause 8** amends section 14 of the principal Act by authorising the Minister to make regulations by notice in the *Gazette*, after consultation with the Committee, regarding any matter related to economic regulation, the procedures to be followed in terms of non-compliance by the company, and the form to be used to lodge a complaint with the Committee. The Minister is also authorised to make regulations regarding the form to be used and the manner in which to lodge an appeal with the Appeal Committee.

3.9 **Clause 9** amends the long title of the principal Act as a result of the amendments that will be incorporated in the principal Act, once the Bill is enacted.

3.10 **Clause 10** amends certain expressions, citations and words that are used in the principal Act by updating those expressions, citations and words to reflect the present dispensation.

3.11 **Clause 11** is the short title and commencement, which is a standard provision dealing with the short title and commencement of the envisaged Act.

## 4. CONSULTATION

The draft Bill was published in the *Gazette* for public comments on 02 December 2014 (*Gazette* No. 38279, GNR. 1096). The following stakeholders were consulted:

The aviation industry stakeholders who were part of the Project Team, including:

- Committee;
- ACSA;
- ATNS;
- BARSA; and
- AASA.

The Project Team of the Single Transport Economic Regulator was also consulted.

## 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 of the Republic of South Africa, 1996 (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 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'') are 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.

6.3 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.

6.4 Other key points to consider as stated in the Tongoane case are as follows:

6.4.1 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, has been identified undermines the role that provinces should play in the enactment of national legislation affecting them.

6.4.2 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. 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 because it may pass legislation with regard to any matter, including a matter within a functional area listed in Schedule 4, but excluding, a matter within a functional area listed in Schedule 5 of the Constitution (i.e. a functional area of exclusive provincial legislative competence).

6.5 Section 76(3) of the Constitution states that ''*[a] Bill must be dealt with in accordance with the procedure established by either subsection (1) or subsection (2) if it falls within a functional area listed in Schedule 4 . . . .*''. We have noted that the contents of this Bill relates mostly to the subject of air traffic and air navigation services, which does not specifically fall within the ambit of any of the functional areas listed in Schedule 4 of the Constitution (i.e. a functional area of concurrent national and provincial legislative competence), neither does it fall within the ambit of Schedule 5 of the Constitution (i.e. a functional area of exclusive provincial legislative competence). Although the functional area ''*Airports other than international and national airports*'' is listed in Part A of Schedule 4 of the Constitution as a functional area of concurrent national and provincial legislative competence, we are not convinced that the draft Bill relates to the functional area ''*Airports other than international and national airports*''. The Collins English Dictionary defines ''*airport*'' as ''*a landing and taking-off area for civil aircraft, usually with surfaced runways and aircraft maintenance and passenger facilities*''. The Longman Concise English Dictionary defines ''*airport*'' as ''*a fully-equipped airfield that is used as a base for the transport of passengers and cargo by air*''.

6.6 Considering the purpose of the Bill, as contained in the long title, it would seem that the Bill deals, in substance, with matters that relate more to the provision of services associated with airports (e.g. aerodrome control service, control service and air traffic advisory services), than it deals with the ''*landing and taking-off area for civil aircraft, usually with surfaced runways and aircraft maintenance and passenger facilities*'', as contemplated by the

ordinary meaning of the word ''*airport*''. Furthermore, the Bill relates to both international and national airports, whilst the functional area listed in Part A of Schedule 4 of the Constitution specifically pertains to ''*Airports other than international and national airports*''.

6.7 One may ultimately be tempted to argue that the contents of the Bill fall within the functional area of ''*Trade*'', which is listed in Part A of Schedule 4 of the Constitution, because the Bill establishes a subsidiary to the company to provide, amongst others, aerodrome control services, control services and air traffic advisory services outside of the Republic. The Collins English Dictionary defines ''trade'' as follows:

> *'' 'trade' means—*
> 1. *the act or an instance of buying and selling goods and services either in the domestic (wholesale and retail) markets or on the international (import, export, and entrepôt) markets related adjective mercantile;*
> 2. *the people and practices of an industry, craft, or business;*
> 3. *exchange of one thing for something else;*
> 4. *amount of custom or commercial dealings; business;*
> 5. *a specified market or business — the tailoring trade;*
> 6. *an occupation in commerce, as opposed to a profession;*
> 7. *commercial customers, as opposed to the general public — trade only, trade advertising;*
> 8. *(transitive) to buy and sell (commercial merchandise);*
> 9. *to exchange (one thing) for another;*
> 10. *(intransitive) to engage in trade;*
> 11. *(intransitive) to deal or do business (with) — we trade with them regularly;*
> 12. *intended for or available only to people in industry or business — trade prices.*''.

6.8 It is our view that, although the Bill establishes a subsidiary that would be responsible for the acquisition, establishment, development, provision, maintenance, management, control or operation of air navigation infrastructures, air traffic services or air navigation services outside of the Republic, its contents cannot be regarded as ''trade'', as contemplated in Part A of Schedule 4 of the Constitution, read with the Constitutional Court's definition of ''trade'' in *Ex Parte President of the Republic of South Africa: In Re Constitutionality of the Liquor Bill 2000 (1) SA 732 (CC)* (''Liquor Bill case''), since the Bill does not relate substantially to imports or exports.

6.9 Although we could not classify the Bill as one which falls within the ambit of any of the functional areas listed in Part A of Schedule 4 of the Constitution, we would have to consider the principles established in case law in relation to the tagging of Bills, especially in relation to the impact of Bills on the provinces.

6.10 The Constitutional Court, in the Liquor Bill case, concluded that there is a difference between determining whether the National Assembly or National Council of Provinces (''NCOP'') has the competence to legislate in a particular field, and determining how a Bill ought to be properly tagged and ultimately enacted. These are two different processes for which two different tests must be applied.

6.11 Tagging must thus be informed by its purpose and is not concerned with determining the sphere of government that has the competence to legislate on a matter. Nor is the process concerned with preventing interference in the legislative competence of another sphere of government. The process is concerned with the question of how a Bill must be considered by the provinces and in the NCOP. The question of how a Bill must be considered by the provincial legislatures depends on whether it affects the provinces. The more

it affects the interests, concerns and capacities of the provinces, the more say the provinces should have on its content.

6.12 We acknowledge that the constitutional role of the provinces is to legislate on matters that substantially affect them and, informed by the substantial measure test and the test for tagging, as confirmed in the Tongoane case. We considered every provision of the Bill, focusing on the need to ensure that provinces fully and effectively exercise their appropriate role in the process of considering national legislation that substantially affect them. In its current format, the Bill would probably not have a substantial impact on the provinces. The ATNS and any subsidiary established in terms of this Bill, is a national company of which an executive authority (i.e. a Cabinet Member designated by the President of the Republic as the Shareholding Minister) exercises the rights attached to the shares of the ATNS, on behalf of the State and the Bill will not have a substantial impact on the provinces. In the light of the case law in relation to the tagging of Bills, we are of the view that this Bill must be dealt with in terms of section 75 of the Constitution.

6.13 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.

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