

REPUBLIC OF SOUTH AFRICA

BORDER MANAGEMENT AUTHORITY BILL

*(As introduced in the National Assembly (proposed section 75); explanatory summary of
Bill published in Government Gazette No. 39262 of 6 October 2015)
(The English text is the official text of the Bill)*

(MINISTER OF HOME AFFAIRS)

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BILL

To provide for the establishment, organisation, regulation, functions and control of the Border Management Authority; to provide for the appointment, terms of office, conditions of service and functions of the Commissioner; to provide for the appointment and terms and conditions of employment of officials; to provide for the duties, functions and powers of officers; to provide for the establishment of an Inter-Ministerial Consultative Committee, Border Technical Committee and advisory committees; to provide for delegations; to provide for the review or appeal of decisions of officers; to provide for certain offences and penalties; to provide for the Minister to make regulations with regard to certain matters; and to provide for matters connected therewith.

PREAMBLE

RECOGNISING that border management is exercised by multiple organs of state with the purpose of securing the borders of the Republic and protecting national interest;

RECOGNISING FURTHER that there is a need for integrated and co-ordinated border management that facilitates secure travel and legitimate trade in accordance with the Constitution, international and domestic law, in order to—

- contribute to the socio-economic development of the Republic;
- ensure effective and efficient border law enforcement functions at ports of entry and the border;
- contribute to the facilitation of legitimate trade and secure travel;
- contribute to the prevention of smuggling and trafficking of human beings and goods;
- prevent illegal cross-border movement;
- contribute to the protection of the Republic's environmental and natural resources; and
- protect the Republic from harmful and infectious diseases, pests and substances;

ACKNOWLEDGING that the circumstances of modern travel and trade require a single Authority to be responsible for ports of entry and the control of the borders of the Republic and the need to balance the facilitation of legitimate trade and travel with security; and

ACKNOWLEDGING FURTHER the constitutional responsibility of the South African National Defence Force to defend and protect the Republic, its territorial integrity and its people,

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

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CHAPTER 1

DEFINITIONS, APPLICATION AND OBJECT OF ACT

Definitions 30

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| 1. | (1) In this Act, unless the context indicates otherwise— | |
| | “ airspace ” means the air borders, being the outer limit of the internationally recognised airspace of the Republic; | |
| | “ Authority ” means the Border Management Authority established by section 4 of this Act; | 35 |
| | “ border guard ” means the border guard referred to in section 6(1)(b); | |
| | “ border law enforcement area ” means, in respect of— | |
| | (a) the land border, a distance of 10 kilometres or any reasonable distance inside the internationally recognised borders of the Republic; and | |
| | (b) the maritime borders, a distance of 10 kilometres or any reasonable distance on the landward side of the baselines extending seaward to the outer limit of the Exclusive Economic Zone as defined in the Maritime Zones Act, 1994 (Act No. 15 of 1994); | 40 |
| | “ border law enforcement functions ” means functions conferred on the Authority by law and in terms of this Act; | 45 |
| | “ border management ” means the execution of border law enforcement functions and includes co-operation with the South African National Defence Force on the implementation of border protection functions; | |

“border protection functions” means the functions performed exclusively by the Defence Force in terms of section 200(2) of the Constitution of the Republic of South Africa, 1996;
“Border Technical Committee” means the Committee established by section 26;
“commissioned officer” means an officer referred to in section 14; 5
“Commissioner” means the person appointed in terms of section 7(1) of this Act;
“Constitution” means the Constitution of the Republic of South Africa, 1996;
“Defence Force” means the South African National Defence Force;
“goods” includes any wares, supplies, merchandise, articles, products, commodities, currencies, documents, substances, animals, plants and their products, genetic materials, vehicles, waste, human remains, containers of such goods or any other thing capable of being transported; 10
“Inter-Ministerial Consultative Committee” means the Committee established by section 25;
“Labour Relations Act” means the Labour Relations Act, 1995 (Act No. 66 of 1995); 15
“Minister” means the Minister of Home Affairs;
“officer” means a person appointed in terms of section 13(1)(b)(i) and includes commissioned officers;
“officials” means officers and support staff of the Authority; 20
“port of entry” means a port of entry designated by the Minister in terms of section 9A of the Immigration Act, 2002 (Act No. 13 of 2002) and includes any port, point or place of entry or exit determined under any other legislation or any other port, point or place of entry or exit approved by the Minister in terms of section 31 of this Act; 25
“prescribed” means prescribed by regulation;
“Public Finance Management Act” means the Public Finance Management Act, 1999 (Act No. 1 of 1999);
“regulation” means any regulation made under this Act;
“support staff” means a person appointed in terms of section 13(1)(b)(ii); 30
“this Act” includes regulations; and
“vehicle” includes any vessel, aircraft, locomotive, railway carriage, conveyance, container or receptacle or any other means of transport, whether or not used for the purpose of transporting goods or persons.

Application of Act 35

- 2.** (1) This Act applies to the exercise by the Authority of its border law enforcement functions within the border law enforcement area and at ports of entry.
 (2) This Act applies outside the territory of the Republic in accordance with any binding international agreement entered into in terms of section 231 of the Constitution.
 (3) This Act does not apply to— 40
 (a) the border protection functions exercised by the Defence Force;
 (b) the border law enforcement functions performed by the Defence Force in respect of the airspace of the Republic; and
 (c) postal services as defined in section 1 of the Postal Services Act, 1998 (Act No. 124 of 1998). 45

Object of Act

- 3.** The object of this Act is to establish and empower the Authority to achieve—
 (a) integrated border law enforcement within the border law enforcement area and at ports of entry; and
 (b) co-operation on and co-ordination of border management matters in general. 50

CHAPTER 2

BORDER MANAGEMENT AUTHORITY

Establishment of Authority

- 4.** (1) The Border Management Authority is hereby established as a national public entity, as contemplated in Part A of Schedule 3 of the Public Finance Management Act, 55

outside of the public service, and is an armed service established in terms of section 199(3) of the Constitution.

(2) The border law enforcement functions within the border law enforcement area and at ports of entry must be performed exclusively by the officers of the Authority.

Functions of Authority 5

5. The functions of the Authority are to—
- (a) facilitate and manage the legitimate movement of persons within the border law enforcement area and at ports of entry;
 - (b) facilitate and manage the legitimate movement of goods within the border law enforcement area and at ports of entry; and 10
 - (c) co-operate and co-ordinate with other organs of state, border communities or any other persons on its border law enforcement functions.

Composition of Authority

6. (1) The Authority is composed of— 15
- (a) a Commissioner;
 - (b) a border guard comprising officers and commissioned officers; and
 - (c) support staff.
- (2) The Minister must, after consultation with the Commissioner, determine the staff establishment and organisational structure of the Authority in a manner that promotes the object of this Act. 20

CHAPTER 3

COMMISSIONER

Appointment of Commissioner

7. (1) The President must appoint a Commissioner who— 25
- (a) is a fit and proper person;
 - (b) possesses tertiary qualifications appropriate to the post;
 - (c) holds a minimum of 10 years' appropriate senior management experience;
 - (d) is a South African citizen;
 - (e) has not been convicted and imprisoned without the option of a fine, except for a criminal offence for which the person has been granted amnesty in terms of the Promotion of National Unity and Reconciliation Act, 1995 (Act No. 34 of 1995); 30
 - (f) has a trustworthy and exemplary character; and
 - (g) is a commissioned officer or must, subsequent to his or her appointment as the Commissioner— 35
 - (i) successfully complete any prescribed training; and
 - (ii) comply with the prescribed security grading requirements, to be appointed as a commissioned officer.
- (2) (a) If the Commissioner is absent or unable to perform the functions of office, the Minister may designate a person who meets the criteria, set out in subsection (1), as the acting Commissioner. 40
- (b) Whenever the office of the Commissioner is vacant, or the Minister is for any reason unable to designate a person as contemplated in paragraph (a), the President must, after consultation with the Minister, appoint a person who meets the criteria, set out in subsection (1), as the acting Commissioner. 45

Terms of office of Commissioner

8. (1) The Commissioner holds office for an agreed term not exceeding five years: Provided that the term of office may be extended only once at the expiry of such period for a further period not exceeding five years.
- (2) The President must notify the Commissioner, in writing, at least two calendar months before the expiry of the term referred to in subsection (1), or any subsequent period, whether the President intends extending the Commissioner's term of office and, if so, for what period. 50

(3) Subject to subsection (5), the Commissioner must vacate his or her office on attaining the age of 65 years.

(4) If the Commissioner attains the age of 65 years after the first day of any month, he or she must be deemed to attain that age on the first day of the next succeeding month.

(5) If the President is of the opinion that it is in the public interest to retain the Commissioner in his or her office beyond the age of 65 years, and— 5

(a) the Commissioner wishes to continue to serve in such office; and

(b) the mental and physical health of the person concerned enable him or her so to continue,

the President may from time to time direct that the Commissioner be so retained, but not for a period which exceeds, or periods which in the aggregate exceed, two years: Provided that the Commissioner's term of office shall not exceed 10 years. 10

Removal of Commissioner from office

9. (1) The Commissioner must not be suspended or removed from office, except in accordance with the provisions of subsections (2), (3), (4) and (5). 15

(2) Subject to the Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000), the President may remove the Commissioner from his or her office—

(a) for misconduct;

(b) on account of continued ill-health;

(c) on account of incapacity to carry out his or her duties of office effectively and efficiently; 20

(d) on account that he or she is no longer a fit and proper person to hold the office concerned; or

(e) on account of a loss of confidence in the Commissioner.

(3) The President may suspend the Commissioner pending an investigation into the circumstances referred to in subsection (2). 25

(4) If the Commissioner is suspended in terms of subsection (3), he or she must continue to receive his or her remuneration, allowances and any other benefit that he or she is entitled to receive as if he or she was not suspended, pending the outcome of any investigation or inquiry. 30

(5) (a) The President may allow the Commissioner, at the Commissioner's request, to vacate his or her office for any other reason which the President considers sufficient.

(b) A request referred to in paragraph (a) must be addressed to the President at least six calendar months prior to the date on which the Commissioner wishes to vacate his or her office, unless the President grants a shorter period in a specific case. 35

(c) If the Commissioner vacates his or her office in terms of paragraph (a), the Commissioner is entitled to such pension as he or she would have been entitled to under the pension law applicable to him or her.

Conditions of service and remuneration of Commissioner

10. (1) The President must, after consultation with the Minister, determine the conditions of service of the Commissioner. 40

(2) The President must, after consultation with the Minister and the Minister of Finance, determine the remuneration, allowances and other benefits of the Commissioner.

Functions of Commissioner 45

11. (1) The Commissioner must exercise control over and manage the Authority in accordance with this Act and the directions of the Minister.

(2) The Commissioner is the Chief Executive Officer of the Authority and is responsible and accountable for—

(a) the efficient and effective performance of the Authority's functions, including the determination of service standards and the publication thereof in the *Gazette*; 50

(b) the day-to-day running of the Authority;

(c) the formation and development of an efficient administration;

(d) the development of a strategic plan setting out the priorities and objectives of the Authority, as required in terms of the Public Finance Management Act; 55

- (e) establishing and maintaining bureaus, depots, quarters, workshops or any other institution of any nature whatsoever, subject to applicable legislation, which may be expedient for the general management, control and maintenance of the Authority;
 - (f) establishing and maintaining an effectively functioning border risk management and targeting centre in the prescribed manner; 5
 - (g) establishing and maintaining a training institution in accordance with any applicable legislation;
 - (h) managing labour relations including—
 - (i) the control of officials; 10
 - (ii) maintaining discipline;
 - (iii) the training of officials; and
 - (iv) determining the qualifications and competency standards for officials in accordance with the prescribed requirements;
 - (i) considering a review or appeal in terms of section 30(3); and 15
 - (j) reporting to the Minister on an annual basis, or at the request of the Minister, on the performance of the Authority.
- (3) The Commissioner is the accounting authority for the Authority and is responsible and accountable for—
- (a) the income and expenditure of the Authority; 20
 - (b) all assets and the discharge of liabilities of the Authority;
 - (c) the proper and diligent implementation of the Public Finance Management Act; and
 - (d) reporting to the Minister on the financial matters of the Authority, which report must be included in the report referred to in subsection (2)(j). 25
- (4) The Commissioner is the commander of the border guard and is responsible for the management, command and control of the border guard.

Delegation by Commissioner

- 12.** (1) The Commissioner may delegate to any official of the Authority any function or power conferred, or duty imposed, on the Authority or the Commissioner by this Act or any other legislation. 30
- (2) Any delegation in terms of subsection (1)—
- (a) is subject to the conditions that the Commissioner may determine;
 - (b) must be in writing;
 - (c) does not prevent the Commissioner from exercising that power or performing that duty; and 35
 - (d) may at any time be withdrawn in writing by the Commissioner.

CHAPTER 4

APPOINTMENT AND FUNCTIONS OF OFFICIALS

Appointment of officials 40

- 13.** (1) The Commissioner must—
- (a) determine and implement a uniform recruitment procedure for the appointment of officials; and
 - (b) appoint—
 - (i) officers who must be members of the border guard; and 45
 - (ii) support staff.
- (2) The filling of any post on the staff establishment, whether by appointment, promotion or transfer, must be done in accordance with the Constitution, labour legislation and this Act.
- (3) Every official must undergo an appropriate security clearance process. 50
- (4) The employment of an official is terminated if he or she refuses to undergo a security clearance process, referred to in subsection (3).
- (5) The Commissioner must ensure that officers undergo adequate and appropriate training that would enable them to perform the functions of the border guard effectively.
- (6) An identification card in the prescribed form— 55
- (a) must be issued to each officer;

- (b) must be produced on demand in the performance of border law enforcement functions; and
- (c) constitutes *prima facie* proof of appointment as an officer.

Commissioned officers

- 14.** (1) The Minister may confer a temporary or permanent commission on the Commissioner and any officer of the Authority. 5
- (2) An officer upon whom a commission has been conferred in terms of subsection (1) must be issued with a Deed of Commission bearing the signature of the Minister.
- (3) In order to qualify as a commissioned officer, an officer must— 10
- (a) swear or declare allegiance to the Republic;
 - (b) be a South African citizen;
 - (c) have served successfully on probation as an acting officer with a temporary commission for a prescribed period;
 - (d) have successfully completed any prescribed training;
 - (e) not have been convicted and imprisoned without the option of a fine, except 15 for a criminal offence for which the person has been granted amnesty in terms of the Promotion of National Unity and Reconciliation Act, 1995 (Act No. 34 of 1995);
 - (f) be a fit and proper person to serve and must have a trustworthy and exemplary character; and 20
 - (g) comply with prescribed security grading requirements.
- (4) The Minister may only cancel a commission after notifying the officer concerned of a complaint or charge made and after allowing the officer an opportunity to respond to the complaint or charge.

Duties, functions and powers of officers of border guard 25

- 15.** (1) An officer must ensure compliance with and enforce the provisions of this Act.
- (2) An officer may exercise any power that may be conferred on him or her in a declaration as a peace officer, referred to in section 334(1)(a) of the Criminal Procedure Act, 1977 (Act No. 51 of 1977).
- (3) When performing any border law enforcement function, an officer must exercise 30 his or her powers in a manner that takes due regard of the fundamental rights of persons, as guaranteed under Chapter 2 of the Constitution, and public international law obligations of the Republic, with proper consideration of the rights and interests of vulnerable groups, including victims of trafficking, refugees and asylum seekers.
- (4) The Commissioner must follow the procedures set out in section 71 of the Labour 35 Relations Act in relation to the designation of duties, functions and powers of officers of the Authority as an essential service.

CHAPTER 5

EMPLOYMENT TERMS AND CONDITIONS OF OFFICIALS

Terms and conditions of employment 40

- 16.** (1) Notwithstanding the provisions of section 4, officials are employed subject to the terms and conditions of employment determined by the Minister—
- (a) in consultation with the Minister of Finance; and
 - (b) in accordance with any collective agreement concluded in the Public Service Co-ordinating Bargaining Council. 45
- (2) Subject to the Government Employees Pension Law, 1996 (Proclamation No. 21 of 1996), a person appointed as an official—
- (a) becomes a member of the Government Employees Pension Fund referred to in section 2 of the Government Employees Pension Law, 1996 (Proclamation No. 21 of 1996); and 50
 - (b) is entitled to receive pension and retirement benefits from an organ of state as if that person were in service in their previous employment dispensation.
- (3) The Commissioner may, after consultation with the Minister, prescribe a framework for the compensation of officials and their dependants when injured or killed

in the line of duty, which may include matters such as medical incapacity, disability pension, a disability regime and compulsory life insurance.

Limitation of rights of officers

17. (1) Subject to the Constitution, the rights of officers may be limited in the prescribed manner and to the extent set out in subsection (2). 5

(2) To the extent necessary for purposes of border law enforcement and the safety of officers, such officers may from time to time be subjected to—

- (a) searches and inspections; and
- (b) security clearances.

CHAPTER 6 10

POWERS OF ENTRY, SEARCH AND SEIZURE

Powers of entry, search and seizure with warrant

18. An officer may, with a warrant—

- (a) enter any premises within the border law enforcement area or at a port of entry; 15
- (b) search any person, goods, premises or vehicle within the border law enforcement area or at a port of entry;
- (c) inspect any goods, documents, premises or vehicle within the border law enforcement area or at a port of entry;
- (d) seize anything found in that search or inspection that may be lawfully seized; 20
- (e) question any person about any matter related to the passage of persons, goods or vehicles through a port of entry or across the border law enforcement area and confirm their responses in a written declaration; and
- (f) arrest or detain any person reasonably suspected of contravening any provision of this Act. 25

Powers of entry, search and seizure without warrant

19. An officer may, without a warrant, exercise any power in terms of section 18(a), (b), (c) or (d) if—

- (a) a person who is competent to do so consents to the entry, search, inspection or seizure exercised in terms of section 18(a), (b), (c) or (d); or 30
- (b) the officer on reasonable grounds believes that—
 - (i) a warrant will be issued if applied for; and
 - (ii) the delay in obtaining the warrant is likely to defeat the object of such warrant.

Routine searches and seizures 35

20. (1) An officer may, without a warrant, conduct a roadblock or set up a checkpoint within the border law enforcement area or at a port of entry with the written approval of the Commissioner.

(2) An officer may, without a warrant—

- (a) conduct a routine inspection or search of any person, goods, documents, premises, or vehicle within the border law enforcement area or at a port of entry for the purpose of ascertaining compliance with the provisions of this Act; and 40
- (b) during such an inspection or search—
 - (i) order any driver of a vehicle to stop; 45
 - (ii) seize or detain anything found that may be lawfully seized or detained;
 - (iii) question any person about any matter related to the passage of persons or goods, documents, vehicles through a port of entry or in the border law enforcement area; and
 - (iv) detain or arrest any person reasonably suspected of contravening any provision of this Act. 50

Powers relating to vessels within maritime borders

- 21.** An officer may, without a warrant—
- (a) order any vessel within the maritime borders of the border law enforcement area to stop;
 - (b) require the master of a vessel to facilitate the boarding of a vessel by that officer by all appropriate means; 5
 - (c) board a vessel accompanied by such other persons whose assistance is reasonably required in the execution of the officer's functions and powers;
 - (d) muster the crew of a vessel;
 - (e) require the master to produce for examination and make copies of a certificate of registry, licence, permit, log book or official documents, relating to— 10
 - (i) the import or export of goods and the entry or exit of persons into or out of the Republic; or
 - (ii) a vessel and to the crew or any member thereof or to any person on board the vessel, which is in their respective possession or control on board the vessel; 15
 - (f) require the master to appear, in person, and give an explanation concerning a vessel, the crew, any person or goods on board the vessel or document referred to in paragraph (e);
 - (g) enquire into whether any provision of this Act has been contravened; 20
 - (h) make an entry dated and signed in a vessel's log book;
 - (i) if there are reasonable grounds to believe that an offence under this Act relating to the import or export of goods or the entry or exit of any person has been or is being committed, require the master to take a vessel to any place, port or harbour in the territory of the Republic for the purpose of carrying out any search, examination or enquiry; or 25
 - (j) give directions to the master and any crew member of any vessel stopped, boarded or searched as may be necessary or reasonably expedient for any purpose specified in this Act or for the compliance by the vessel, master or any crew member with any condition of a licence. 30

Detained or arrested persons and seized goods

- 22.** (1) If an officer detains or arrests a person with or without a warrant, that officer must, as soon as reasonably possible, bring that person to a police station under the control of the South African Police Service or, if a warrant expressly stipulates another place, bring the person to that place. 35
- (2) If an officer seizes anything found in a search conducted in terms of this Act, that officer must, as soon as possible—
- (a) inform the relevant organ of state of the seizure; and
 - (b) deliver the object seized in a manner, and to a place or relevant organ of state, as required by the relevant legislation. 40

CHAPTER 7

FUNDS AND IMMOVABLE PROPERTY

Funds of Authority

- 23.** The funds of the Authority consist of—
- (a) monies appropriated annually by Parliament; 45
 - (b) any government grants made to it; and
 - (c) any other monies legally acquired by it.

Immovable property

- 24.** (1) The Commissioner may, in consultation with the Minister, acquire, maintain and dispose of immovable property for the purpose of fulfilling the objects of this Act. 50
- (2) The Minister must, in accordance with the Public Finance Management Act, determine the policy and procedure for the Authority on the acquisition, maintenance and disposal of immovable property.

(3) Any organ of state that owns immovable property that hosts a port of entry must provide and maintain reasonable accommodation for the Authority, as determined by the Minister, to effectively and efficiently perform its functions: Provided that the Authority is liable for any associated service fees and costs.

(4) The Minister must determine reasonable accommodation referred to in subsection (3) with due regard to this Act or any other legislation. 5

CHAPTER 8

COMMITTEES AND IMPLEMENTATION PROTOCOLS

Inter-Ministerial Consultative Committee

- 25.** (1) The Inter-Ministerial Consultative Committee is hereby established to— 10
- (a) consult on—
- (i) the designation, determination, appointment or prescription, and withdrawal or cancellation of a port of entry;
 - (ii) the proposed amendment of any legislation that may affect border management; 15
 - (iii) any international agreement or protocol that affects the Authority;
 - (iv) the advice and reports of the Border Technical Committee referred to in section 26(3) and (4); and
 - (v) any other matter referred to it by any of the Cabinet members referred to in subsection (3)(b) or (c); and 20
- (b) consider and discuss the Commissioner's reports on the performance of the Authority in terms of section 11(2)(j).
- (2) The President must designate a chairperson and a deputy chairperson of the Inter-Ministerial Consultative Committee.
- (3) The Inter-Ministerial Consultative Committee consists of— 25
- (a) the Minister;
- (b) the Cabinet members responsible for—
- (i) Agriculture, Forestry and Fisheries;
 - (ii) Cooperative Governance and Traditional Affairs;
 - (iii) Defence and Military Veterans; 30
 - (iv) Environmental Affairs;
 - (v) Finance;
 - (vi) Health;
 - (vii) Police;
 - (viii) State Security; 35
 - (ix) Trade and Industry;
 - (x) Economic Development;
 - (xi) Tourism; and
 - (xii) Transport; and
- (c) any other Cabinet member designated by the President. 40
- (4) The meetings of the Inter-Ministerial Consultative Committee—
- (a) are convened by the chairperson; and
 - (b) are held as regularly as may be necessary to perform its functions.
- (5) The Inter-Ministerial Consultative Committee may determine its own rules and procedures. 45

Border Technical Committee

- 26.** (1) The Border Technical Committee is hereby established.
- (2) The Border Technical Committee consists of the Commissioner and the heads of other organs of state or their duly delegated representatives: Provided that a duly delegated representative must be a member of the senior management services of the organ of state. 50
- (3) The Border Technical Committee must advise the Inter-Ministerial Consultative Committee on—
- (a) the implementation of legislation, policies and protocols related to border management; 55

- (b) the application, outcomes and operational effectiveness of legislation, policies, protocols, structures, standards, procedures and strategy related to border management; and
- (c) any matter referred to it by the Inter-Ministerial Consultative Committee, the Commissioner or any member of the Border Technical Committee. 5
- (4) The Border Technical Committee must report quarterly to the Inter-Ministerial Consultative Committee.
- (5) The Commissioner is the chairperson of the Border Technical Committee and the Minister must designate the deputy chairperson of the Committee.
- (6) The Border Technical Committee must determine its own rules and procedures 10 that must not be in conflict with the Act or any other legislation.

Advisory committees

- 27.** (1) The Minister may, as and when the need arises, appoint one or more advisory committees to advise the Minister and the Commissioner on any matter concerning border management and the functioning of the Authority, including resource utilisation, 15 asset management, human resources and information technology.
- (2) The Minister—
- (a) must determine the terms of reference of an advisory committee appointed in terms of subsection (1);
 - (b) must appoint as members of an advisory committee persons— 20
 - (i) who are fit and proper;
 - (ii) with the requisite expertise and experience; and
 - (iii) who have the ability to perform effectively;
 - (c) may appoint persons as members of an advisory committee on such conditions as the Minister may determine; and 25
 - (d) may appoint as members of an advisory committee persons independent of the Authority.

Implementation protocols

- 28.** (1) Where the implementation of a policy, the exercise of a statutory power, the performance of a statutory function or the provision of a service relating to border law 30 enforcement functions by the Authority depends on the participation of other organs of state, the Authority and those organs of state must co-ordinate their actions in such a manner as may be appropriate or required in the circumstances by entering into an implementation protocol in accordance with section 35 of the Intergovernmental Relations Framework Act, 2005 (Act No. 13 of 2005). 35
- (2) The Minister may initiate the process for the conclusion of implementation protocols in the Inter-Ministerial Consultative Committee.
- (3) The organs of state referred to in subsection (1) must, within a reasonable time after the commencement of the Act, enter into implementation protocols with the Authority to collaborate on and ensure the alignment of technological, electronic, 40 information and communication systems and procedures necessary to ensure the efficient sharing of relevant information with the Authority.
- (4) The implementation of protocols concluded in terms of this section must be co-ordinated by the Inter-Ministerial Consultative Committee.

CHAPTER 9

45

GENERAL

Delegation by Minister

- 29.** (1) The Minister may delegate to the Commissioner or any official any function or power conferred, or duty imposed, on the Minister that is permitted to be delegated.
- (2) The Minister may not delegate a power referred to in sections 14(1), 14(4), 24(2), 27(1), 27(2), 28(2), 31, 32, 37 and 39(2). 50
- (3) Any delegation in terms of subsection (1)—
- (a) is subject to the conditions that the Minister may determine;
 - (b) must be in writing;

- (c) does not prevent the Minister from exercising that power or performing that duty; and
- (d) may at any time be withdrawn in writing by the Minister.

Review or appeal of decisions

30. (1) Any decision made by an officer in terms of this Act that materially and adversely affects the rights of any person must be communicated to that person in the prescribed manner and must be accompanied by written reasons. 5

(2) Any person aggrieved by a decision referred to in subsection (1) may, within the prescribed period, make an application in the prescribed manner to the Commissioner for the review or appeal of that decision. 10

(3) The Commissioner must consider the application referred to in subsection (2), where after the Commissioner must confirm, set aside or modify that decision and communicate his or her decision in writing to the aggrieved person within the prescribed period.

(4) Any person aggrieved by the decision of the Commissioner referred to in subsection (3) may, within the prescribed period, make an application in the prescribed manner to the Minister for the review or appeal of that decision. 15

(5) The Minister must consider the application referred to in subsection (4), where after the Minister must confirm, set aside or modify the Commissioner's decision and communicate his or her decision in writing to the aggrieved person within the prescribed period. 20

Designation, determination, appointment, prescription, withdrawal or cancellation of ports, points or places of entry or exit

31. (1) Notwithstanding any other legislation, the power to designate, determine, appoint, prescribe, withdraw or cancel any port, point or place of entry or exit for— 25

- (a) the movement of goods; or
- (b) the movement of persons,

in and out of the Republic may only be made with the approval of the Minister.

(2) The Minister must, prior to the designation, determination, appointment, prescription, withdrawal or cancellation of any port, point or place of entry or exit, publish a notice in the *Gazette* for public comments for a period of not less than 30 days. 30

Reporting

32. The Minister must table the reports referred to in section 11(2)(j) and section 11(3)(d) in Parliament within 30 days after receiving such report from the Commissioner. 35

Exemption from payment of fees or tolls

33. When performing any function or exercising any power in terms of this Act, an officer, including the vehicle in which the officer is being transported and any person accompanying the officer, is exempted from the payment of any fee or toll to enter or use any public or private premises, thoroughfare or ferry. 40

Confidentiality

34. Subject to the Protected Disclosures Act, 2000 (Act No. 26 of 2000), an official may not disclose any confidential or personal information acquired in the performance of the Authority's functions to any person, except—

- (a) to an authorised official; 45
- (b) to a person designated by the Commissioner or the Minister to receive such information;
- (c) to a person authorised to receive such information in terms of the relevant legislation; or
- (d) when required or authorised to do so by a court or any law. 50

Liability

35. (1) Subject to subsection (2), the Minister, the Commissioner, the Authority or its officials are not liable for any damage or loss caused by—

- (a) the exercise of any power or the performance of any duty in terms of this Act; or
- (b) the failure to exercise a power or perform a duty under this Act.

(2) Subsection (1) does not apply in respect of unlawful conduct that is committed negligently or intentionally.

Offences and penalties

36. (1) It is an offence for any person— 10

- (a) to induce any official by giving or promising a reward to contravene this Act or any relevant legislation or to breach that official's duties under those laws;
- (b) to compel any official through threats to contravene this Act or any relevant legislation or to breach that official's duties under those laws;
- (c) to pretend to be, or impersonate, an official; 15
- (d) to resist, hinder or obstruct an official in the performance of his or her functions or duties under this Act or any relevant legislation; or
- (e) to intentionally furnish information that is false or misleading to an official.

(2) It is an offence for an official to solicit or accept an inducement to perform or not perform a duty or function or contravene this Act or any relevant legislation or to breach any duties imposed under this Act or any relevant legislation. 20

(3) It is an offence for any person to demand a toll or fee or subject any officer, who has identified himself or herself as an officer, to unreasonable delay or detention in respect of the entry into or use of the property or facilities referred to in section 24(3).

(4) It is an offence for— 25

- (a) an official to contravene section 34; and
- (b) an officer to commit a breach of the prescribed disciplinary code related to the border law enforcement functions of an officer.

(5) If a person is convicted of an offence referred to in—

- (a) subsection (1) or (2), that person is liable to a fine or a period of imprisonment not exceeding 10 years or to both a fine and imprisonment; 30
- (b) subsection (3) or (4)(a), that person is liable to a fine or a period of imprisonment not exceeding 12 months or to both a fine and imprisonment; and
- (c) subsection (4)(b), that person is liable to a fine or a period of imprisonment or to both a fine and imprisonment. 35

Regulations

37. (1) The Minister may, after consultation with the Commissioner, make regulations regarding—

- (a) the terms and conditions of appointment of officials; 40
- (b) the qualifications and competency standards for officials;
- (c) the structure and functioning of the border guard;
- (d) the commissioning of officers;
- (e) the grading and rank of officers;
- (f) the training and arming of officers; 45
- (g) a disciplinary code of conduct for officers;
- (h) the rules for the conduct of meetings and procedures of advisory committees;
- (i) the handling and resolution of complaints and grievances affecting the work of the Authority;
- (j) any matter which is required or permitted by this Act to be prescribed; and 50
- (k) any administrative or procedural matter necessary or expedient for the implementation of this Act.

(2) A regulation made under subsection (1) may prescribe a fine or a period of imprisonment for a maximum of five years for any contravention thereof or failure to comply therewith. 55

(3) The Minister may only make a regulation referred to in subsection (1)(g) after consultation with the recognised trade unions.

(4) The Minister may make regulations that prescribe different penalties for different degrees of misconduct of officers in breach of the disciplinary code of conduct for officers.

(5) The Minister must, before making regulations under this Act, publish the draft regulations in the *Gazette* for public comments for a period of not less than 30 days. 5

CHAPTER 10

TRANSITIONAL PROVISIONS

Transfer of employees from organ of state to Authority

- 38.** (1) If an employee is transferred from an organ of state to the Authority—
- (a) the transfer does not interrupt the employee's continuity of service; 10
 - (b) the employee may not, upon transfer, suffer any reduction in remuneration or amendment of conditions of service;
 - (c) the transfer does not affect any disciplinary proceedings pending against that employee and must be finalised as if the transfer had not occurred; and
 - (d) the transfer must be effected in accordance with fair labour practices. 15

(2) For purposes of the Income Tax Act, 1962 (Act No. 58 of 1962), the Labour Relations Act and the Public Administration Management Act, 2014 (Act No. 11 of 2014), no change of employer must be regarded as having taken place by virtue of the transfer referred to in subsection (1).

(3) If there is any dispute arising from the interpretation or application of this section, that dispute must be referred to the Labour Court for determination. 20

Assets, liabilities and funds

39. (1) The transfer of assets, liabilities and funds to the Authority will be managed in accordance with the Public Finance Management Act.

(2) The Minister must, in conjunction with the executive authority of an organ of state concerned, and with the approval of the Minister of Finance, and in the spirit of co-operative government envisaged in Chapter 3 of the Constitution, enter into an agreement with such organ of state to ensure that the assets, rights, obligations and liabilities, including the unexpended balance of appropriations, authorisations, allocations and other funds employed, held or used in connection with the management and administration of border law enforcement, are transferred to the Authority. 30

(3) The Registrar of Deeds must make the necessary entries or endorsements for the transfer of any property in terms of subsection (1), and no office fee or other charge is payable in respect of that entry or endorsement.

(4) Any litigation resulting from any cause of action in relation to the assets, rights, obligations or liabilities transferred to the Authority, which arose— 35

- (a) before the transfer date, must be conducted by or against the relevant organ of state concerned; and
- (b) on or after the transfer date, must be conducted by or against the Authority.

Ports, points and places of entry or exit 40

40. (1) The ports of entry at the commencement of this Act are—

- (a) those designated by the Minister in terms of section 9A of the Immigration Act, 2002 (Act No. 13 of 2002);
- (b) those appointed or prescribed by the Commissioner of the South African Revenue Service in terms of section 6 of the Customs and Excise Act, 1964 (Act No. 91 of 1964); and
- (c) those determined by the Minister responsible for Agriculture in terms of the Agricultural Pests Act, 1983 (Act No. 36 of 1983), the Agricultural Product Standards Act, 1990 (Act No. 119 of 1990), the Animal Diseases Act, 1984 (Act No. 35 of 1984) and the Animal Health Act, 2002 (Act No. 7 of 2002). 50

(2) Subject to section 31(2) and in order to ensure consistency and integration of the different functions, the Minister may withdraw or cancel a designation, determination, appointment or prescription of a port, point or place of entry or exit under subsection (1)(b) or (c), after consultation with the Commissioner of the South African Revenue Service or the Minister of Agriculture, as the case may be. 55

Recognised trade unions

41. Any reference to trade unions recognised by the Authority in this Act must be read as a reference to the trade unions that are recognised by, or parties to, collective bargaining arrangements with other organs of state.

CHAPTER 11

5

SHORT TITLE AND COMMENCEMENT**Short title and commencement**

- 42.** (1) This Act is called the Border Management Authority Act, 2016.
- (2) The President may, by proclamation, determine different dates in respect of—
- (a) the commencement of different provisions of this Act; or
 - (b) the application of this Act to different parts of the border law enforcement area or different ports of entry.

10

MEMORANDUM ON THE OBJECTS OF THE BORDER MANAGEMENT AUTHORITY BILL, 2016

1. INTRODUCTION

1.1 Border management in South Africa is currently exercised by multiple organs of state with a purpose of securing the borders of the Republic and protecting national interest. There is a need for integrated and co-ordinated border management that facilitates secure travel and legitimate trade, in accordance with the Constitution, international and domestic law, in order to—

- contribute to the socio-economic development of the Republic;
- ensure effective and efficient border law enforcement functions at ports of entry and the border;
- contribute to the facilitation of legitimate trade and secure travel;
- contribute to the prevention of smuggling and trafficking of human beings and goods;
- prevent illegal cross-border movement;
- contribute to the protection of the Republic's environmental and natural resources; and
- protect the Republic from harmful and infectious diseases, pests and substances.

1.2 The circumstances of modern travel and trade require a single Authority to be responsible for ports of entry and control of the borders of the Republic and the need to balance the facilitation of legitimate trade and travel with security.

2. PURPOSE OF BILL

The Border Management Authority Bill, 2016 (the “Bill”), seeks to provide for the establishment, organisation, regulation, functions and control of the Border Management Authority (the “Authority”); to provide for the appointment, terms of office, conditions of service and functions of the Commissioner; to provide for the appointment and terms and conditions of employment of officials; to provide for the duties, functions and powers of officers; to provide for the establishment of an Inter-Ministerial Consultative Committee, Border Technical Committee and advisory committees; to provide for delegations; to provide for the review or appeal of decisions of officers; to provide for certain offences and penalties; to provide for the Minister to make regulations with regard to certain matters; and to provide for matters connected therewith.

3. OBJECT OF BILL

3.1 **Clause 1** provides definitions for various concepts and terminology utilised within the Bill. Key concepts include the definitions of “border law enforcement area”, “border law enforcement functions”, “border management” and “port of entry” that assist in defining the mandate of the Authority.

3.2 **Clause 2** outlines the application of the Bill once it is enacted. The Bill applies to the exercise by the Authority of border law enforcement functions at ports of entry and within the border law enforcement area. The envisaged Act has extra-territorial application in accordance with international agreements concluded in terms of section 231 of the Constitution of the Republic of South Africa, 1996 (the “Constitution”), that are binding on the Republic. The envisaged Act does not apply to the border protection functions, border law enforcement functions exercised by the Defence Force and postal services as defined in section 1 of the Postal Services Act, 1998 (Act No. 124 of 1998).

- 3.3 **Clause 3** outlines the object of the Bill once it is enacted, which is to establish and empower the Authority to achieve integrated border law enforcement within the border law enforcement area and co-operation and co-ordination of border management matters in general.
- 3.4 **Clause 4** outlines the establishment of the Authority. The Authority is an organ of state that is established as a national public entity, contemplated in Part A of Schedule 3 of the Public Finance Management Act, 1999 (Act No.1 of 1999) (the “PFMA”), outside of the public service, but subject to the PFMA. The Authority is further established as an armed service in terms of section 199(3) of the Constitution. Clause 4 further outlines that border law enforcement functions within the border law enforcement area and at ports of entry will be performed exclusively by the officers of the Authority.
- 3.5 **Clause 5** outlines the functions of the Authority. The Authority performs border law enforcement functions at ports of entry and within the border law enforcement area. Border law enforcement functions pertaining to, amongst others, agriculture, environmental affairs, immigration and customs will be transferred by proclamation (i.e. in terms of section 97 of the Constitution) to the Minister. Other key functions include the facilitation and management of the legitimate movement of persons and goods within the border law enforcement area and at ports of entry and to co-operate and co-ordinate its border law enforcement functions with other organs of state, border communities or any other persons.
- 3.6 **Clause 6** outlines the composition of the Authority. The Authority is composed of a Commissioner, a border guard (which comprises officers and commissioned officers) and support staff. The Minister must determine the staff establishment and organisational structure of the Authority after consultation with the Commissioner.
- 3.7 **Clause 7** makes provision for the appointment of a Commissioner. The President appoints the Commissioner of the Authority, who must be a South African citizen with tertiary qualifications appropriate to the post and a minimum of 10 years of appropriate senior management experience. There is provision in this clause for the Minister of Home Affairs (the “Minister”) to designate a person as the acting Commissioner if the Commissioner’s office is vacant. However, if the Commissioner’s office is vacant or Minister is, for any reason, unable to designate a person to act as Commissioner, the President may, after consultation with the Minister, appoint a person who has the same qualifications as the Commissioner, to act as Commissioner.
- 3.8 **Clause 8** outlines the terms of office of the Commissioner. The Commissioner holds office for an agreed term not exceeding five years, which may only be extended once for a further period not exceeding five years. The President must notify the Commissioner at least two months before the expiry of his or her term of office if the President intends extending the Commissioners term of office. The Commissioner must vacate his or her office at the age of 65. However, the President may retain the Commissioner for a further period not exceeding two years after he has reached the age of 65 under certain circumstances: Provided that the term of office of the Commissioner may not exceed an aggregate of 10 years.
- 3.9 **Clause 9** provides for the President to remove and suspend the Commissioner from office on account of misconduct, continued ill-health, loss of confidence, etc. The removal process is subject to the Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000). Provision is also made for voluntary resignation by the Commissioner.
- 3.10 **Clause 10** provides for the Commissioner’s conditions of service and remuneration that are determined by the President, after consultation with the Minister and remuneration of the Commissioner that must be determined by the President after consultation with the Minister and the Minister of Finance.

- 3.11 **Clause 11** provides for the main functions and responsibilities of the Commissioner as the Chief Executive Officer and accounting authority of the Authority, and the commander of the border guard. These functions include being responsible and accountable for the efficient and effective performance of the functions of the Authority, including the determination and publication of service standards, the day-to-day running of the Authority, the formation and development of an efficient administration, the income and expenditure of the Authority, all assets and the discharge of liabilities of the Authority, as well as the management, command and control of the border guard.
- 3.12 **Clause 12** authorises the Commissioner to delegate, in writing, to any official of the Authority any function or power conferred, or duty imposed, in terms of the envisaged Act or any other legislation.
- 3.13 **Clause 13** provides for the the appointment of officials by the Commissioner. The Commissioner must determine a uniform recruitment procedure and appoint persons to the fixed staff establishment of the Authority. Officials of the Authority consist of officers and commissioned officers, who are members of the border guard, and support staff. All officials must undergo an appropriate security clearance and officers must be issued with an identification card, which constitutes *prima facie* proof of appointment.
- 3.14 **Clause 14** provides for the Minister to confer a temporary or permanent commission on the Commissioner and any officer of the Authority. The minimum qualifications of such commissioned officers are outlined in this clause. The Minister may cancel a commission conferred in terms of this clause.
- 3.15 **Clause 15** outlines the main duties, functions and powers of officers of the border guard. The officers must execute all functions, duties and powers that may be conferred on them in accordance with the envisaged Act. Officers may also exercise any power conferred on them as peace officers in terms of section 334(1) of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), as peace officers.
- 3.16 **Clause 16** outlines the terms and conditions of employment of all officials (i.e. both officers of the border guard and support staff) of the Authority, as determined by the Minister in consultation with the Minister of Finance. Officials become members of the Government Employees Pension Fund (the “GEPF”). The Commissioner may prescribe a framework for compensation for officials and their dependants when officials are injured or killed in the line of duty. This must be done after consultation with the Minister.
- 3.17 **Clause 17** provides that, subject to the Constitution, the rights of officers may be limited in the prescribed manner and to the extent necessary for purposes of border law enforcement and the safety of officers. Officers may from time to time be subjected to searches, inspections and security clearances.
- 3.18 **Clause 18** provides for instances when officers may exercise their powers to enter, search or seize with a warrant.
- 3.19 **Clause 19** provides for instances when officers may exercise their powers to enter, search or seize without a warrant.
- 3.20 **Clause 20** authorises an officer to, without a warrant, conduct a roadblock or set up a checkpoint within the border law enforcement area or at a port of entry with the written approval of the Commissioner.
- 3.21 **Clause 21** refers to an officer’s powers relating to vessels within maritime borders, which powers do not require a warrant.
- 3.22 **Clause 22** refers to an officer’s powers to detain, arrest and seize goods.

- 3.23 **Clause 23** provides for the funding of the Authority. The Authority's funds consist of funds appropriated annually by Parliament, government grants and any other monies legally acquired by it.
- 3.24 **Clause 24** makes provision for the management of immovable property. The Commissioner may, with the Minister's approval, acquire, maintain and dispose of immovable property for the purposes of fulfilling the objects of the Bill. The Minister must, in accordance with the PFMA, determine the policy and procedure for the acquisition, maintenance and disposal of immovable property. Any landlord or owner of immovable property that hosts a port of entry is obliged to provide and maintain reasonable accommodation for the Authority, as determined by the Minister, in order for the Authority to effectively and efficiently perform its functions. The Authority is liable for associated service fees and costs. The Minister must determine reasonable accommodation with due regard to the Act or any other legislation.
- 3.25 **Clause 25** makes provision for the establishment of an Inter-Ministerial Consultative Committee. The purpose of the Committee is to consult on any matter related to the Authority's functions or any domestic or international legislation that may affect the Authority's functions. The Minister, as well as the Cabinet members responsible for Finance, Defence and Military Veterans, Agriculture, Forestry and Fisheries, Police, Trade and Industry, State Security, Environmental Affairs, Health, Cooperative Governance and Traditional Affairs, Transport, Economic Development, Tourism and any other Cabinet member designated by the President, are members of this Committee. The President must designate a chairperson and deputy chairperson.
- 3.26 **Clause 26** establishes the Border Technical Committee to advise the Inter-Ministerial Consultative Committee on the implementation of legislation, policies and protocols related to border management, the application, outcomes and operational effectiveness of legislation, policies, protocols, structures, standards, procedures related to border management, and any matter referred to it by the Inter-Ministerial Consultative Committee or the Commissioner.
- 3.27 **Clause 27** provides that the Minister may, as and when the need arises, appoint one or more advisory committees to advise the Minister and the Commissioner on any matter concerning border management and the functioning of the Authority.
- 3.28 **Clause 28** provides that the Authority may, in accordance with section 35 of the Intergovernmental Relations Framework Act, 2005 (Act No. 13 of 2005), enter into implementation protocols relating to border management issues.
- 3.29 **Clause 29** provides that the Minister may, in writing, delegate to the Commissioner or any official any function or power conferred, or duty imposed, on the Minister that is permitted to be delegated, with the exception of certain listed functions and powers.
- 3.30 **Clause 30** provides for reviews or appeals by any person aggrieved by the decision of either an officer of the Authority or the Commissioner.
- 3.31 **Clause 31** provides for the designation, determination, appointment, prescription, withdrawal or cancellation of ports, points or places of entry or exit. Notwithstanding any other legislation, the power to designate, determine, appoint, prescribe, withdraw or cancel any port, point or place of entry or exit for the passage of goods or persons in and out of the Republic under any legislation may only be made with the approval of the Minister.
- 3.32 **Clause 32** provides for reporting by the Minister to Parliament on an annual basis on the functioning of the Authority.

- 3.33 **Clause 33** provides that when performing any function or exercising any power in terms of the envisaged Act, an officer, including the vehicle in which the officer is being transported and any person accompanying the officer, is exempted from the payment of any fee or toll to enter or use any public or private premises, thoroughfare or ferry.
- 3.34 **Clause 34** provides that, subject to the Protected Disclosures Act, 2000 (Act No. 26 of 2000), an official may not disclose any confidential or personal information acquired in the performance of the Authority's functions to any person, except under certain specified circumstances.
- 3.35 **Clause 35** provides that, except in respect of unlawful conduct that is committed negligently or intentionally, the Minister, the Authority, the Commissioner or its officials are not liable for any damage or loss caused by the exercise of any power, the performance of any duty in terms of the envisaged Act or the failure to exercise a power or perform a duty under the envisaged Act.
- 3.36 **Clause 36** provides for offences and penalties. Offences include, *inter alia*, where any person negatively hinders or obstructs the work of the Authority or an official, where an official solicits a bribe, etc. The period of imprisonment varies between 12 months and a maximum of 10 years. Offences are also provided for in instances where an officer breaches the prescribed disciplinary code.
- 3.37 **Clause 37** provides for the Minister to make regulations on various matters affecting the Authority, after consultation with the Commissioner. In relation to particular labour matters the Minister may only make regulations after consultation with the trade unions that engage in collective bargaining with the Authority. The Minister must, before making any regulations under the Act, publish the draft regulations in the *Gazette* for public comments for a period of not less than 30 days.
- 3.38 **Clauses 38, 39 40 and 41** contain transitional arrangements relating to the transfer of employees, assets, liabilities and funds, ports, points and places of entry or exit and the recognition of trade unions.
- 3.39 **Clause 42** provides for the short title and commencement of the Bill. The envisaged Act is called the Border Management Authority Act, 2016. The President may determine different dates for the commencement of different provisions of the envisaged Act or the application of the envisaged Act in respect of different parts of the border law enforcement or different ports of entry.

4. CONSULTATION

- 4.1 All associated and relevant border law enforcement agencies and Departments have been consulted and will remain engaged principally through the Authority's Project Management Office in the Department of Home Affairs ("Department"). In addition, the Department of Public Service and Administration ("DPSA"), Department of International Relations and Cooperation ("DIRCO"), Department of Justice and Constitutional Development ("DOJ&CD") and the South African Revenue Service ("SARS") have been consulted and engaged in the form of meetings and a number of workshops. The JCPS Cluster of Directors-General was engaged in June, July and September 2015.
- 4.2 The draft Bill was published on 6 August 2015 in the *Gazette* for public comments. Written comments were received from the following stakeholders:
- International Organisation for Migration;
 - National Regulator on Compulsory Specifications;

- Perishable Products Export Control Board;
- Scalabrini Institute for Human Mobility in Africa;
- The Authority for Refugee Education, Skills Training & Advocacy;
- The International Air Transport Association;
- The South African Association of Freight Forwarders;
- The South African Association of Ship Operators and Agents;
- The South African Diamond and Precious Metals Regulator;
- University of Cape Town; and
- individual members of the public.

4.3 Inputs received were consolidated in a revised document that was subsequently referred to the State Law Advisers. Feedback led to further adjustments and amendments to the Bill.

4.4 The Department further submitted the Bill to NEDLAC for deliberations.

5. FINANCIAL IMPLICATIONS FOR STATE

- 5.1 An Expenditure Performance Review (“EPR”) for the Authority is presently being finalised by the Government Technical Advisory Centre (“GTAC”). The EPR study estimates that R3,8 billion is currently utilised by key agencies and departments to discharge their ports of entry and border law enforcement functions. It is assumed that this is approximately the order of magnitude of funds to be affected by and re-allocated to the Authority.
- 5.2 A key principle in the establishment of the Authority is that funds will follow functions. However, it is envisaged that additional funds may be required for the establishment process of the Authority.
- 5.3 There appears to be no financial implications for the provincial and local spheres of government since the Authority will have earmarked funding allocated to it.

6. PARLIAMENTARY PROCEDURE

- 6.1 The State Law Advisers and the Department are of the opinion that this Bill must be dealt with in accordance with the procedure established by 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 In the matter of *Ex parte the President: In re Constitutionality of the Liquor Bill 2000 1 BCLR 1 (CC)* (the “**Liquor Bill case**”), the Western Cape government argued that the Liquor Bill was constitutionally invalid because it had been passed following the procedure set out in section 76, when in fact it should have been passed following the procedure set out in section 75. Although the Constitutional Court found that it was unnecessary to decide this procedural issue, it did state that it would be “*formalistic in the extreme to hold a bill invalid on the ground that those steering it through Parliament erred in good faith in assuming that it was required to be dealt with under the section 76 procedure, when the only consequence of their error was to give the NCOP more weight, and to make the passage of the bill by the National Assembly in the event of inter-cameral disputes more difficult*”. At the same time, however, the Constitutional Court also pointed out that there are important differences between the procedure set out in section 75 and the procedure set out in section 76.

- 6.3 In the matter of *Tongoane and Others v National Minister for Agriculture and Land Affairs and Others 2010 (8) BCLR 741 (CC)* (the “*Tongoane case*”), Ngcobo CJ reaffirmed the decision of the Constitutional Court in the *Liquor Bill case*, at paragraphs 63 to 64 that the statement: “any Bill whose provisions in substantial measure fall within a functional area listed in Schedule 4”, formulates the test for determining the procedure to be followed in enacting a Bill. Ngcobo CJ further, at paragraph 58, states the following:

“What matters for the purposes of tagging is **not the substance or the true purpose and effect of the Bill**, rather, what matters is **whether the provisions of the Bill “in substantial measure fall within a functional area listed in Schedule 4”**. This statement refers to the test to be adopted when tagging Bills. This test for classification or tagging is different from that used by this Court to characterise a Bill in order to determine legislative competence. This “involves the determination of the subject-matter or the substance of the legislation, its essence, or true purpose and effect, that is, what the [legislation] is about”. (Our emphasis.)

Furthermore, at paragraph 72, it was stated as follows:

“To summarise: any Bill whose provisions substantially affect the interests of the provinces must be enacted in accordance with the procedure stipulated in section 76. This naturally includes proposed legislation over which the provinces themselves have concurrent legislative power; but it goes further. It includes Bills providing for legislation envisaged in the further provisions set out in section 76(3)(a)—(f), over which the provinces have no legislative competence, as well as Bills, the main substance of which falls within the exclusive national competence, but the provisions of which nevertheless substantially affect the provinces. What must be stressed, however, is that the procedure envisaged in section 75 remains relevant to all Bills that do not, in substantial measure, affect the provinces. **Whether a Bill is a section 76 Bill is determined in two ways. First, by the explicit list of legislative matters in section 76(3)(a)—(f); and second by whether the provisions of a Bill in substantial measure fall within a concurrent provincial legislative competence**”. (Our emphasis.)

- 6.4. The methodology that was used by the Court may be summarised as: firstly, considering all the provisions in 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. The Court referred to the affected interests of the provinces as opposed to legislative or other competence. In the English judgment of *Newspaper Licensing Authority Ltd v Marks and Spencer*¹ the court noted the following:

“in deciding what amounts to a substantial part, consideration must be given to the nature of the protected work. The court referred to Laddie, Prescott and Vitoria *The Modern Law of Copyright and Designs* (2nd edition,)

“What is meant by a substantial part? Since this type of copyright is not dependent on originality in the special sense in which that expression is used in copyright law “**substantial part**” **simply means any part of the work so long as it is not so small as to be trivial. This is a question of fact, degree and common sense, and depends on the surrounding circumstances, including the purpose for which the thing is done**”. (Our emphasis.)

- 6.5. Therefore, when considering if the Bill substantially affects the provinces, 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.

¹ (2000) 4 ALL ER 239 at par 24

6.6. Other key points to consider, as stated in the **Tongoane case**, at paragraphs 69 and 70, are as follows:

- 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.
- 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) requires to be enacted in accordance with the section 76 procedure.

6.7. If we have to take into consideration the legal principles expounded by the **Tongoane case**, the following may be deduced from a reading of the Bill:

- (a) The purpose of this Bill is to establish and provide for the national Border Management Authority. The Authority will be a national entity with its own earmarked funding, an accounting officer, and reporting to the Minister on its activities. The carrying out of its mandate will be done by the Commissioner as accounting officer and commander of the border guard. The Authority will appoint officials to carry out the operations of the Authority. There is no provision in the Bill that requires the provinces to be obligated in any form to perform functions for the Authority or that binds the provinces in terms of financial or other resources. The Purpose of the Bill is to create a border management system under a single entity and co-ordinate government policies and the implementation of such policies in line with the retained functions of other organs of state. The Authority will have a symbiotic relation with the other organs of state that performs border law enforcement functions. The Authority will also perform border management functions.
- (b) 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. *Border management, border control or ports of entry* are not listed in either Schedule 4 or 5 of the Constitution.
- (c) We advised in our previous opinions that we have considered the areas listed in Schedule 4 and are of the view that the Authority’s functions may overlap with the following:
 - *Trade*, since custom and exercise functions may be assigned to the Authority within the border law enforcement area and at ports of entry;
 - *tourism* as it impacts on the entry of people through ports of entry;
 - *public transport*;
 - *environmental matters* in relation to the border law enforcement area and ports of entry;
 - *agriculture* in relation to the border law enforcement area and ports of entry;
 - *animal disease and control* in relation to the border law enforcement area and ports of entry; and
 - *municipal airports* that may be considered as ports of entry.

- (d) However, noting the provisions in the Bill, this overlap of functions will not be considered as having a substantial impact on the provinces (i.e. administrative and financial obligations). We have considered the provisions of the Bill and it does not appear to affect the provinces substantially in terms of placing obligations on provinces to perform functions or imposing financial obligations on the provincial fiscus insofar as carrying out the Authority's functions are concerned. We are therefore of the view that this Bill must be tagged as a section 75 Bill.

6.8 The State Law Advisers and the Department 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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