



Draft National State Enterprises Bill 2023

Submission of Public Comment to the
Department of Public Enterprises

**The Public Affairs Research Institute, University of Johannesburg
and
Corruption Watch**

14 October 2023

1. The Public Affairs Research Institute (PARI) and Corruption Watch welcome the opportunity to comment on this draft of the National State Enterprises Bill. State-owned enterprises play a significant role in South Africa's economic development. Chapter 10 of the Constitution requires that they must be governed by principles, inter alia, of professionalism, efficiency, transparency, and accountability. The reality that we see, as outlined in the Zondo Commission and other studies, is systemic mismanagement and corruption, impeding growth of the economy and undermining the prospects of sustainable transformation.
2. The Bill moves to address these issues by establishing a holding company, providing procedures and requirements for the constitution of its board, elaborating standards and mechanism for the behaviour and governance of directors, and creating a process for moving state enterprises into the holding company's control. The announced objectives of the Bill are to separate policy and regulatory from ownership functions, check political interference, promote professionalism, and better manage state assets. We support these objectives, but argue that the Bill can do more to achieve them.
3. The holding company aims to achieve the objectives by acting as an intermediary between political principals and state enterprises. In South Africa, the creation of such intermediaries has often proved ineffectual. Legislation pervasively gives to politicians unchecked powers to appoint the intermediary. These powers have then been used to position political allies and personal connections to facilitate inappropriate political interference within public administrations. We have argued that these practices are unconstitutional and that they have had devastating consequences for politics, public administration, and development. The Bill does little to foreclose these

consequences. Further, the Bill is silent on the appointment processes for the boards of subsidiary entities, and more generally, provisions concerning oversight and accountability are minimal.

4. The Bill gives to the President or their delegate the sole power to act as shareholder for the Republic of South Africa. They are empowered to appoint directors to the board, constrained only by the open terms of s68 of the Companies Act, No. 71 of 2008. s68 is designed for profit companies, where shareholders are relatively small in number, have a direct pecuniary interest in good and profitable management, and can more easily organise to secure this interest. The Republic of South Africa, however, has many more people, their interest in the good management of state enterprises is more diffuse and collective, and so it is relatively difficult to organise to secure this interest. We have seen that certain political leaders and diverse rackets have proven adept at appropriating the resources of our state enterprises to the detriment of the common good. These realities justify stronger checks and balances on presidential prerogative than those contained in the Companies Act.
5. The Zondo Commission found that the ability to place politically connected persons on boards and key posts within SOEs was “the essential mechanism of state capture.” In August 2023, the President stated that this Bill would align the process for the appointment of SOE boards and executive management with the recommendations of the Commission, and that this law would improve oversight, transparency, and accountability of SOEs.¹
6. The Zondo Commission recommends, to provide a check and balance in the appointment of Board members to SOEs, the creation of a standing appointment and oversight committee. The envisaged committee would be responsible for inviting, receiving, and transparently assessing prospective appointees to the boards of state enterprises. The names of one to three of the best qualified prospective appointees would be forwarded to the shareholder representative of the Republic. The shareholder representative could then, within 30 days, appoint from these names or refuse to appoint with written reasons. If the shareholder representative fails to proceed within 30 days or the written reasons for not appointing are deemed invalid by the committee, then the first ranked recommendation of the committee would be appointed.
7. The Zondo Commission’s recommendations were for appointments to state enterprises themselves. We suggest that the Commission’s recommendations could be adapted for the appointment process for board members to the holding company.
8. s8 of the draft Bill provides for appointment on grounds of skill, knowledge, and experience, which will, when considered collectively, enable directors to fulfil the objectives of the holding company. These requirements will, together with s69 of the Companies Act, constitute the grounds for qualification, disqualification, and ineligibility applicable to company directors. s71 of the

¹ <https://www.thepresidency.gov.za/from-the-desk-of-the-president/desk-president-monday%2C-14-august-2023>

Companies Act establishes procedures for removal of board members. These are insufficient safeguards against inappropriate appointment and for dealing with misconduct of board members.

9. Adapting the Zondo recommendations, we propose that a standing “integrity” appointment and oversight committee be established in law to support the appointment of Board members and other senior appointments to the holding company, and to deal with complaints and concerns regarding the conduct of such appointees. The Committee would receive nominations of potential candidates to the Board, and would be tasked to ensure, by way of a public hearing, that any person nominated for appointment to the Board or as the Chief Executive Officer, Chief Financial Officer, or Chief Procurement Officer of the holding company meets the professional, reputational and eligibility requirements for such a position. They would then submit a long list to the shareholder from which the shareholder could appoint. They would also verify the transparency, integrity, and reasonableness of the appointment process before an appointee is confirmed. This would ensure an appropriate check and balance in appointment processes while preserving the shareholder’s role in appointment. The committee will also investigate and act upon any complaints received concerning the misconduct of any Board member or senior executive in the discharge of his or her duties.
10. The Committee would consist of a retired judge nominated by the Chief Justice to preside as chairperson, a senior legal practitioner appointed by the chairperson of the Legal Practice Council, a senior representative from the business community and of organised labour appointed by the National Economic Development and Labour Council, a registered auditor appointed by the chairperson of the Independent Regulatory Board of Auditors, an industry expert appointed by the Public Service Commission, and a representative of an established anti-corruption non-profit organisation, such organisation to be identified by the chair of the committee.
11. We submit that this novel structure is appropriate to the central importance of state enterprises to the South African economy. It is supported by the participatory spirit of Chapter 10 and broader provisions of the Constitution.
12. We submit that, even if such a model is not adopted, the Bill must provide for clear recruitment and appointment processes for board members and executives of the holding company (and its subsidiaries). Substantive appointment criteria for board directors should be clearly articulated in law. There should be a transparent and public process of board nominations, in which there are clear checks and balances, where independent bodies assume a role as check and balance within these processes, and “independence” requires that they are established as statutory independent bodies, constituted through channels other than the executive, with independent appointment processes and security of tenure. This is to guard against the advancement of individual, particularistic interests and state capture of state-owned enterprises as highlighted by the Zondo Commission. Stringent transparency, accountability and oversight measures should form the cornerstone of the Bill.

13. Last, we note that the Bill gives no timelines for the phasing-in of state-owned enterprises as subsidiaries of the holding company, nor does it provide criteria for which entities are to be transferred. This Bill also does not apply to entities that currently remain under the control of line departments. There is no overarching primary legislation and no coherent policy framework governing SOEs, as was recommended by the Presidential Review Committee in 2013. The governance problems plaguing our SOEs, enabled and exacerbated by the complex and conflicting legal and policy architecture currently in place, will continue. There should be a single, primary, and more comprehensive piece of legislation regulating the governance of state-owned entities, which this Bill does not provide.

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