

FINAL DRAFT

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MINISTRY OF WORKS, TRANSPORT AND COMMUNICATION



DEPARTMENT OF TRANSPORT

MEMORANDUM

ROAD SECTOR REFORM IN NAMIBIA:

VOLUME 2:

EXPLANATORY NOTES ON THE

ROADS AUTHORITY ACT, 1999

(Act No. 17 of 1999)

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Volume 3: Explanatory Notes on the Road Fund Administration Act)

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VOLUME 2 : EXPLANATORY NOTES ON THE ROADS AUTHORITY ACT

1. THE ROADS AUTHORITY ACT

Status of the Act

1.1 The Act was promulgated by Government Notice No. 231 of 21 October 1999. Whilst the major part of the Act came into effect on 25 October 1999, the final date of commencement was 1 April 2000.

Structure of the Act

1.2 The Act is divided into four parts which provides a logical grouping of the main concepts, as follows:

- (a) Part I : Preliminary Provisions: which contains the definitions;
- (b) Part II : The Roads Authority: which establishes the Roads Authority, defines the objectives of the Authority, provides for the appointment of the board of directors to manage the affairs of the Authority, prescribes the functioning of the board, the appointment of a Chief Executive Officer and other employees and, finally, sets out the powers and functions of the Authority;
- (c) Part III : Management of road network: which defines the expression “management of the national road network”, makes provision for a procedures agreement between the Road Fund Administration and the Authority and for the submission, by the Authority, of a Performance Statement to the Minister; and
- (d) Part IV : General Provisions: which deals with the Annual Report, Financial Year, Accounting and Auditing, failure of the Authority to comply with certain provisions, Regulations, Transitional provisions, the amendment of the Local Authorities Act, 1992 and the short title and commencement of the Act.

Long title

1.3 The Long Title refers to:

- (a) the establishment of the Roads Authority; and
- (b) various incidental matters.

1.4 The Act was introduced by the Minister of Works, Transport and Communication as the Minister responsible for the transport function.

2. PART I : PRELIMINARY PROVISIONS

Section 1 : Definitions

2.1 The definitions are necessary to explicitly define certain key concepts. The most important is:

- (a) “Minister” means the Minister responsible for transport (the Minister of Works, Transport and

Communication);

- (b) “national road network” which is defined so that it refers to proclaimed trunk, main and district roads (farm roads, which are also proclaimed for purposes of public accessibility, are therefore not included). Proclaimed roads inside local authority areas, if proclaimed in terms of the Roads Ordinance, 1972 (Ordinance No. 17 of 1972) would be included in the national road network.

3. PART II : THE ROADS AUTHORITY

Section 2 : Establishment of the Roads Authority

3.1 This section establishes the Roads Authority and defines it as a juristic person in order to enable it to act as a legal entity in legal relationships.

Section 3 : Objects of the Authority

3.2 Section 3 defines the objective of the Authority as being to manage the national road network with a view to achieving a safe and efficient road sector. This does not change the fact, however, that it is an agency of the Government as contemplated in Article 5 of the Namibian Constitution and functions as part of the executive branch.

3.3 The following should be noted:

- (i) The Authority is responsible for managing the national road network, but the ownership of the national road network does not vest in the Authority. Ownership continues to vest in the Government of Namibia, with the Minister of Works, Transport and Communication being the responsible Minister with appropriate enabling powers in regard to roads in terms of the Roads Ordinance, 1972 (Ordinance No. 17 of 1972)¹;
- (ii) “management” in relation to the national road network, is defined in section 16(1) and refers to and includes operational functions such as planning, designing, constructing and maintaining roads. See, however, later discussion with regard to “assigned” functions in terms of section 16(1)(f). The Authority is obliged to contract out design and construction activities (see sections 16(3) and 27(10));
- (iii) the function of managing the national road network is not an open-ended function, but is linked to the achievement of a specific objective, namely a road sector which is both “safe” and “efficient”; and
- (iv) the expression “road sector” rather than “road network” has been used to indicate that it is an efficient and safe road transport sector as a whole, i.e. the combination of the road infrastructure and road transport operations (vehicle operations), which is the ultimate objective.

Section 4 : Board of directors

3.4 The responsibility for the policy, control and management of the Authority is that of the board of directors,

¹ The Roads Ordinance is due to be updated in due course - probably in the form of a new Roads Act for Namibia. The Minister is obliged to delegate the necessary powers in terms of the Ordinance to the Authority (see section 16(6) of the Act).

established in terms of subsection (1) of section 16. (This evidently means that all original powers of the Authority vest in the board.)

3.5 Subsection (2) provides that the board shall consist of not less than three and not more than five members, to be appointed by the Minister from amongst persons who have expertise relevant to the functions of the Authority. The majority of members shall not be members of the Public Service. The idea was to create a compact management body which is in line with the contemporary Government policy. The ideal is that all members should possess of appropriate expertise in areas such as engineering, transport economics, management, etc., which would relate to the functions of the body. Managerial experience on the part of its members is perhaps the most important valuable asset of the board. The Ministerial power to make all board appointments testifies to the close relationship between the Minister and the Authority.

3.6 The chairperson is appointed from amongst the members by the Minister (subsection (3)). This measure is one of the typical control powers which a line Minister exercises in respect of an agency of state for which his or her portfolio is responsible.

3.7 As a general measure of transparency, it is required that the names and nationality of directors be published in the *Gazette*.

Section 5: Disqualification for appointment as director

3.8 Unrehabilitated insolvents or persons with a conviction for a criminal offence during a period of ten years preceding the commencement of the Act or thereafter are disqualified from being board members. A future legislative amendment which restricts the period of ten years to a period of ten years immediately preceding the consideration of a candidate's appointment, would be appropriate.

Section 6 : Tenure of office of directors

3.9 Board members hold office for three years and may be re-appointed. A period of three years is considered to be the minimum period required to ensure continuity in management.

Section 7 : Vacation of office and filling of vacancies

3.10 The customary provisions are applicable. Although the Minister is entitled to remove a member under this section, the provision gives recognition to the fact that such action is an administrative act which must be exercised subject to the dictates of natural justice (see Article 18 of the Namibian Constitution). Nevertheless, the Minister's power to remove board members should not be seen as a general "licence" to remove individual members or all members the board where he/she is not in agreement with the board on any particular issues. The fact is that "unfitness" to act as a board member must be manifest. Subsection (3) clearly confers a duty upon the Minister to fill a vacancy so that continuity and the proper functioning of the board is ensured.

Section 8 : Alternate directors

3.11 This section provides that an alternate director must be appointed for each board member. This is necessary to ensure that the board will be able to function. Problems can occur if the board consists of only three members and one or more members are unavailable (see requirements for a quorum in section 9(5) - three members are required for a quorum). The chief executive officer should ensure that all persons appointed as alternatives must be kept informed of board resolutions, actions and activities. The board should also adopt standing rules on the timely notification of the chief executive officer in cases where board members cannot attend meetings, etc.

Section 9 : Meetings of the board

3.12 This section provides for the Minister to determine the time and place of the board's first meeting and includes various other provisions which are standard with regard to statutory boards in Namibia. The power of the Minister to refer matters for consideration during meetings of the board again alludes to the board's role as an extension of the Minister in respect of his/her executive function, and is a useful procedural measure to keep the board involved in, and utilise the resources of the board so as to address, contemporary matters in the roads sector. (See also the board's advisory function provided for in section 15(1)(c)). The quorum for a board meeting is set at three members to ensure a minimum degree of consensus. Records of the proceedings of all board meetings shall be kept and submitted to the Minister. This obligation is calculated to ensure that the Minister is kept informed of the board's position on matters of importance and to strengthen his/her role in the independent control relationship between himself/herself and the board.. The board's evaluation of, and advice on, any matter dealt with at a meeting in consequence of a Ministerial request under section 9(3), will evidently appear from the record (minutes) of the meeting.

3.13 The board may permit any person who has an interest in any matter to be considered by the board, or the representative of such a person, to attend board meetings and take part in discussions. This measure is intended to create openness and to facilitate consultation procedures. It is felt that a democratic and transparent style of management would contribute much towards public and stakeholder participation in the affairs of the Authority and to enhance its credibility. But to open the door for "outside inputs" does not mean that the board can be forced to adapt its position in any given circumstances. Hence no participant is accorded a right to vote.

Section 10 : Disclosure of interest

3.14 This section contains certain typical and certain new "anti-corruption" and "conflict of interest" and "insider trading" provisions. The basic strategy of the provision is the same as that which the Companies Act, 1973 (Act No. 61 of 1973) employs in keeping directors of companies "in check". The section imposes a duty on members to disclose their interests (which are evidently interests with an economic value). Although the wording of the section refers in a very general way to an "interest" as an interest in a contract, proposed contract or any other matter to be considered at a board meeting, and which may result in a potential conflict of interests position for the interested member in question, it is submitted that "purposive interpretation" should be applied to give effect to the spirit of the provision and its strong anti-corruption sentiment. The provisions of this section are intended to prevent any director who has an interest in any proposed contract or any matter to be decided by the board, from influencing other members and from voting on such a proposed contract or other matter.

3.15 The fact that the Authority (see section 16(3)), must contract out all work such as road construction or road maintenance and will also make extensive use of consultants for the planning and design of roads, means that many potential persons with expertise in roads matters and active as consultants or contractors, will, if appointed as board members, have to withdraw from certain board discussions. It is submitted that although a person can only disclose that which he/she knows, there may be a duty on every board and committee member to take reasonable steps to investigate any potential "interest" which comes to his/her attention.

3.16 Failure to disclose an interest is an offence and punishable by either a fine or imprisonment. In addition, a convicted person may incur an additional fine based on the monetary value of any advantage gained by non-disclosure of interest (the so-called "profits of crime").

Section 11 : Allowances

3.17 The formulation allows for possible allowances if members of the board or committees are assigned tasks in addition to preparing and attending official meetings, e.g. to conduct investigations *in loco* or to meet with road user groups. Although the activities of the board and committees are sponsored by the Road Fund as part of the

Authority's administrative expenditure (section 17(1)(a) of the Road Fund Administration Act, 1999 (Act No. 18 of 1999)), provision was made for Ministerial approval of allowances in order to create a "check and balance". It must be assumed that the term "allowances" should not necessarily be interpreted too narrowly, and that expenditure incurred by a member in the performance of all his/her duties on behalf of the Authority would be recoverable under this section - if not, the activities of the Authority would be inhibited

Section 12 : Committees of the board

3.18 The section provides the board with the power to appoint committees, consisting of persons who need not be directors, to assist it in the performance of its functions. At least one member of any committee appointed under this section shall, however, be a director. This requirement is to ensure that the board closely monitors the work of any committee without having to call a full committee meeting or that committees have to attend board meetings in order to report to the board. The provision to appoint committees to assist the board is regarded as necessary because it is expected that the board will have to give attention to a wide variety of matters, for example also those referred to the Authority by the Minister under section 15(1)(c). Another need may be the establishment of a standing committee in which stakeholders are accommodated. The section is seen as a necessary mechanism to complement a small, compact board.

3.19 Committee members are subject to the requirements regarding disclosure of interest, above, and are paid such allowances as determined by the board in consultation with the Minister.

Section 13 : Restriction of liability

3.20 This section contains the usual indemnification in respect of persons who act in the course of the performance of the exercise of statutory powers. The normal practice for an aggrieved party is to act against the statutory body itself. This is in any event the only option in cases of mere negligence, and which are excluded in the exception provided for in the section.

Section 14 : Chief Executive Officer and other employees

3.21 Subsection (1) provides for the board to appoint, in consultation with the Minister, a chief executive officer with expertise relevant to the functions of the Authority who shall be responsible for the performance of the functions of the Authority as its executive "arm". It follows that he/she should also be entitled to exercise all such powers (including incidental powers) as are associated with his/her role and which are usually performed by chief executive officers in their capacity as administrative head, and which are necessary for the smooth administration of the Authority's affairs, but subject to such matters as may fall under the inherent powers of the board, and in respect of which a board delegation would be required (section 25(1)(b)). Subsection (2) also makes it clear that the chief executive officer functions under the supervision and in line with the policies and directions of the board. The chief executive officer will in effect be the manager of the Authority and may have a suitable designation such as Chief Roads Engineer or similar. The chief executive officer will usually be a full-time employee of the Authority.

3.22 Subsection (3) provides for the Authority to appoint other employees to assist the chief executive officer. Ordinarily the power to appoint also includes the power to dismiss, and possibly the power to promote, transfer etc. These powers are usually delegated to the chief executive officer in the form of a "delegation" resolution (see section 25(1)(b)).

3.23 The conditions of service (see subsection (4)) and benefits of employees are determined by the Authority, *in consultation* with the Minister, including a pension fund for the benefit of its employees. This is probably the best example of the administrative expenditure of the Authority (section 17(1)(a) of the Road Fund Administration Act, 1999).

3.24 Note that the chief executive officer is also obliged to disclose an interest in the affairs of the Authority under section 10. Although he/she is not a member of the board, it seems imperative that he/she should arrange with the chairperson of the board to be given the opportunity to disclose his/her interest at the relevant board meeting.

Section 15 : Functions of the Authority

3.25 Subsection (1) defines the duties and functions of the Authority. The functions of the Authority are to -

- (a) manage the national road network (“manage” in relation to the national road network is an embracing term and is therefore defined in section 16);
- (b) make recommendations to the Minister regarding the application of the Act, including the making of regulations; and
- (c) advise and assist the Minister or any approved authority or any other person in regard to the planning, design, construction and maintenance of roads or on any powers and duties which the Minister, authority or person performs or exercises under any law.

3.26 It should be noted that the latter function of the Authority is subject to “such conditions as may be agreed upon” and “such conditions as the Minister may determine”. This presupposes that there should be some or other form of agreement which governs the service to be rendered by the Authority and provides for adequate compensation (which should perhaps be based on real expenditure incurred). This means that these services cannot merely be rendered at the expense of the Road Fund and claimed as “administrative expenditure” under section 17(1)(a). Where the beneficiary of the service pays more than the equivalent of real expenditure incurred by the Authority, taxation may be a possibility. Note that the power to render advice and assistance services to third parties is subject to a “safety valve” in the form of Ministerial approval. An interesting feature is that the scope of the “advice” and “assistance” function is relatively wide and extends beyond the Roads Authority Act (see subsection (1)(c)(ii)). It is submitted, however, that the Authority should not be permitted to become involved in matters which are not reconcilable with the Authority’s objectives stated in section 3.

3.27 Subsection (2) empowers the Authority to, with the Minister’s consent, form companies, open banking accounts, acquire property and generally to exercise such powers and do all such things as are provided for in, or are necessary to achieve the objectives of the Act. These companies could form a useful mechanism for the rendering of specialist services which will of course be taxable. The Minister should, as a general principle, not give consent for the Authority to form companies to provide road construction or maintenance services which can be efficiently provided by existing companies.

4. PART III : MANAGEMENT OF ROAD NETWORK

Section 16 : Management of road network

4.1 Subsection (1) defines the term “management” in relation to the road network. Paragraphs (a) to (e) cover the typical functions which would normally be regarded as “management of the road network” and covers all the operational activities necessary to provide the road infrastructure forming part of the national road network and is subject to the qualification “with due regard to the funds at its disposal”.

4.2 The gist of the definition lies in paragraph (a) and which are the equivalent of section 25 of the Roads Ordinance, 1972. The reason why the introductory sentence of subsection (1) overrides “any other law”, is indeed because of the fact that legislation such as the Ordinance also contains provisions which affects the roads sector. Subsection (6) provides for the Minister to delegate relevant powers conferred upon him/her or any other functionary by the Roads Ordinance, 1972, to the Authority (see Government Notice No. 171 of 2000 whereby the Minister had

transferred his/her powers in terms of chapters 4 to 9 (excluding sections 26, 33, 34, 35 and 66) and section 60 of the Ordinance as well as that of the Permanent Secretary responsible for Transport in terms of chapter 3 to the Authority). This delegation was necessary because, until such time as the Ordinance is rewritten to the extent that it integrates the position and the role of the Authority, the Ordinance still remains the primary legislative instrument in which the core statutory powers relating to activities undertaken in the course of roads construction and maintenance are provided for.

4.3 Paragraphs (b) to (e) of subsection (1) aim at supporting activities such as materials testing, supervision of contractor's work and the operation of systems to manage roads as well as activities related to the preventing of excessive damage (road use unavoidably goes hand in hand with some damage to roads but this is regarded as normal and only the preventing of "excessive" damaging is intended). Subsection (7) empowers the Authority to approach any court to seek compensation against any person alleged to be responsible for the damaging of any road managed by the Authority. Provision is made in section 16(1)(h) and (i) of the Road Fund Administration Act for the accrual to the Road Fund of compensation awarded by a court to the Authority in "road damage cases" as well as of fines imposed in pursuance of overloading contraventions. Since section 16(1)(e) of the Roads Authority Act expressly mandates the Authority to prevent damage to roads, it is assumed that the construction of weigh-bridges and other mechanisms by the Authority which are reasonably necessary to curb such damage would be in order.

4.4 Of particular interest, is paragraph (f) of subsection (1) (see also the discussion on section 15(1)(c) above). In terms of this paragraph, any function assigned to the Authority by or under any law (e.g. by way of regulations promulgated under an law or a contract entered into for the performance of certain functions under an law such as a contract contemplated in section 111 of the Road Traffic and Transport Act, 1999), or by the Minister by Notice in the *Gazette* (see e.g. Government Notice No. 169 of 2000 whereby the Minister's functions under the Advertising on Roads and Ribbon Development Ordinance, 1960 (Ordinance No. 30 of 1960) were assigned to the Authority), and which is necessary to achieve the objectives of the Act or (and this is an interesting point) for any purpose relating to road traffic or road transportation, shall be undertaken by the Authority. For all practical purposes such a function must be regarded as forming part of the function "management of the road network"². Similar to the sentiment expressed under the discussion on section 15(1)(c) above, it is submitted that the Authority should not be assigned functions under this provision which are not reconcilable with the Authority's function, in this instance, to manage the national road network. Further, there could also be funding problems when functions which are not reconcilable with the function of managing the national road network, are so assigned to the Authority, since the Road Fund Administration will apply the provisions of sections 17(1), 19 and 20 of the Road Fund Administration Act in determining the funding to be allocated for such additional (assigned) functions. In instances where the Minister wished to "assign" functions to the Roads Authority the nature of such functions should dictate whether they are assigned in terms of section 16(1)(f) or whether the provisions of section 15(1)(c) should be utilised. In particular, if the functions concerned are the Minister's responsibility under a specific law and such a law makes provision for the funding of such functions or the imposition of charges or fees in connection therewith, the matter could be further complicated. The involvement of the Authority could probably best be obtained via an agreement as contemplated under section 15(1)(c).

4.5 Subsection (2)(a) empowers the Authority to enter into agreements with other parties to provide services to or on behalf of the Authority in respect of any matter related to the management of roads. Subsection (2)(b) allows the Authority to delegate necessary statutory powers to parties with whom it has entered into an agreement to act on its behalf.

4.6 In terms of subsection (3) the Authority is obliged to contract out all road construction and maintenance work. It is submitted that the term "outside contractor" denotes any party other than the Authority or one of its companies formed in accordance with section 15(2)(c). Section 27(10) provides for a partial monopoly in favour of

² The implications in this regard are worthwhile of more detailed discussion and the interested reader should refer to legal opinions drafted about the matter during the period April 2000.

the Roads Contractor Company in this respect.

4.7 Subsection (4) addresses an important issue, namely the management of those roads which form part of the national road network³, but which do not necessarily form part of the “economic road network”, i.e. the roads which would qualify, in terms of the road transport economic efficiency principles as provided for in the Road Fund Administration Act, to be funded out of the Road Fund by the Road Fund Administration. A distinction must be made here between (a) the funding for the initial construction of a road which the Road Fund administration is unable to fund in terms of economic efficiency principles, and (b) the funding subsequently required to maintain such a road or to ensure that it complies with prescribed minimum standards in terms of section 16(5) of the Act. Although section 16(4) clearly places an obligation on the Authority to undertake any road project or programme which the Minister directs it to undertake, it is also clear that the Minister must ensure funding to the extent that the Road Fund Administration is unable to fund the project. The Minister is, however, only obligated to provide the funding for initial construction since the Road Fund Administration must thereafter ensure that the relevant road is managed and maintained in accordance with the minimum standards and measures prescribed under section 16(5).

4.8 Subsection (5) is important from the point of view that compliance with the prescribed measures and standards is obligatory (see section 19(1)(a)(ii) of the Road Fund Administration Act), and therefore it applies not only to the Roads Authority but also to the Road Fund Administration which must provide the funds necessary for compliance. Although the formulation of subsection (5) should receive attention during a future series of legislative amendments, it is submitted that the provision empowers the Minister to set minimum specifications and standards for ensuring quality in the course of the construction and maintenance of all roads which are part of the roads network (which obviously includes the maintenance aspect of roads contemplated in subsection (4)). Standards prescribed under the present subsection must also result in a safe road system, compliance with Namibia’s international obligations (see the SADC Protocol on Transport) and protection of the environment in the course of operations (but subject to Namibia’s conservation legislation). This requirement would, of course, only become applicable if the level of maintenance funding which is required in terms of the roads economic efficiency principle, and which the Road Fund Administration is in any event obliged to allocate, is less than the level of funding required in order to comply with the measures and standards prescribed under section 16(5).

Section 17 : Procedures Agreement

4.9 The procedures agreement intends to structure the relationship between the Authority and the Administration and serves as a short/medium term instrument of control embodying working procedures and measures which assists the Administration in monitoring the performance of the Authority in respect of its efficient utilization of funds - one of the duties of the Administration (see clause 15(1)(e) of the Road Fund Administration Act). In this regard the Administration therefore can be regarded as having powers to “demand” information. The matters about which information must be supplied in a procedures agreement and which should thus be included therein are only those which concern the efficient utilization of funds and the way in which the Authority assesses the economic efficiency of proposed projects (in terms of the rules and procedures prescribed under clause 19(2) of the RA. Act). The procedures agreement is a standing “agreement” and is expected to only undergo moderate adaption from time to time. Consultation with stakeholders and the publication of the agreement (subsections (5) and (6)) are required for the sake of transparency and credibility.

Section 18 : Performance statement

4.10 The performance statement is similar to the procedures agreement except that it is an instrument of control

³ The road network is defined in section 1 of the Act. Any road forms part of the road network if it has been proclaimed as either a trunk, main or district road in terms of the Roads Ordinance. The power to proclaim a road vests in the Minister, subject to prescribed procedures, and is independent of whether the Road Fund Administration will ultimately fund such a road in accordance with the principles of the road user charging system.

which the Minister responsible for transport has at his or her disposal to be able to assess whether the strategies to be employed, principles to be implemented and methods to be employed by the Authority will be effective in managing the national road network. The performance statement to be submitted by the Authority to the Minister therefore places the Minister in a position to assess at an early stage whether the Authority is likely to perform efficiently and effectively as regards its intended operational strategies. A performance statement is a forward-looking rather than backward-looking instrument of control (compared to the annual report, accounting and auditing, etc.). The corresponding provisions of a procedures agreement in section 15(2), (3), (4), (5) and (6) also apply to a performance statement.

5. PART IV : FINANCIAL AND GENERAL PROVISIONS

Section 19 : Funds of the Authority

5.1 Paragraphs (b) to (d) of subsection (1) and subsection (2) show that the Authority can, in addition to funds allocated to it by the Road Fund Administration, acquire funds of its own. Such funds may be taken into account by the RFA when it makes its funding determinations in terms of section 20(4) of the Road Fund Administration Act. Funds derived by way of a Parliamentary appropriation will normally be allocated in respect of road projects contemplated in section 16(4). Funds received in the form of donations will normally be transferred by a donor who stipulates that the funds should vest directly in the Authority and be utilised for a specified project. It is evident that these projects will not be submitted by the Authority to the Road Fund Administration, except in cases where additional financing is sought from the Road Fund. (Section 21(2) of the Roads Authority Act and section 20(2)(d) of the Road Fund Administration Act, however, imposes certain duties of disclosure upon the Authority.) Moneys accruing to the Authority as compensation for advice and assistance services rendered under section 15(1)(c) of the Roads Authority Act, offers an example of funds falling within the wide ambit of subsection (1)(d).

Section 20 : Financial year

5.2 In this section it is provided that the financial year of the Authority shall correspond with that determined by the Road Fund Administration for its own financial reporting. The provision is logical and will ensure coordination of the financial activities of the Authority and the Road Fund Administration. Thus section 20(1) of the Road Fund Administration Act, 1999, provides that the Authority's budget must be submitted to the Road Fund Administration at least four months before the commencement of the Administration's financial year. This is necessary so that allocations can be made timeously under section 20(4) in respect of the financial requirements of the Authority.

Section 21 : Accounting and auditing

5.3 Subsection (1) stipulates that the Authority shall keep such accounting records as are necessary to reflect fairly its state of affairs and those of each company (see section 15(2)(a)) it may have formed. The question whether the Authority will have a balance sheet and an income and expenditure statement will depend on whether it operates as a "cost centre" or whether it merely passes on all costs to its two main clients, viz. the Road Fund Administration and the Minister responsible for Transport. In the second instance the Authority will mainly keep record of its expenditure and how this relates to allocated funds. In this respect the Authority's books of account should have a very similar format to that of a government Ministry. (For instance it will have to keep proper record of its own personnel and other administrative or overhead expenditure and ideally the total of these costs should be distributed to its various projects and programmes so that the total costs of each such project and programme can be determined.)

5.4 Although the annual audit is performed by an auditor under the direction of the Auditor-General, the appointment of the auditor is made by the Authority after obtaining the consensus of the Auditor-General (subsection (3)).

Section 22 : Annual report

5.5 The annual report on the activities of the Authority must be submitted by the Authority to the Minister within six months after the end of a financial year. Subsection (2) lists the matters to be covered in an annual report, namely: particulars of projects and programmes related to the management of roads, an assessment of performance according to the performance statement and such other matters as the Minister may require. Whilst the performance statement is a “forward-looking” strategy, the annual report takes a retrospective view of the affairs of the Authority.

5.6 Subsection (3) provides for certain transparency measures viz. that the annual report, financial statements and performance statement must be tabled in the National Assembly within 28 days of receipt thereof by the Minister.

5.7 The correction of the numbering of the subsections of this section is a matter which should be on the agenda for a future amendment of the Act.

Section 23 : Failure of Authority to comply with certain provisions

5.8 One of the important basic policy principles of the restructuring process in the road sector (see Part 1 of this Memorandum) is that the wide powers given to agencies to implement specific objectives should be subject to accountability. The Authority operates in a transparent way and must report extensively on its activities as per the preceding sections of the Act. In order to ensure accountability the legislation provides for the measures to be taken when an agency such as the Authority fails to comply with the provisions of the Act. The Minister is empowered, under section to make a direction whereby the Authority is ordered to take corrective steps.

5.9 Subsection (1) therefore allows any interested person who is of the opinion that the Authority has failed to comply with any provision of the Act, the regulations, the performance statement or procedures agreement to lodge a written complaint with the Minister. To ensure that complaints can be dealt with effectively and fairly, subsection (1)(a) specifies that the grounds of a complaint must be set out, that the complainant must explain his or her interest (*locus standi*) in the matter and that, if appropriate, proof must be provided to substantiate any complaint.

5.10 A copy of any complaint is submitted to the Authority by the Minister (subsection (2)). The Authority is required, in terms of subsection (3), to lodge a written reply with the Minister within 14 days after receipt of a copy of a complaint. It is submitted that the Authority should as soon as possible frame standing procedures concerning the way in which complaints will be investigated, the person/s to be delegated with the responsibility for responding to complaints, etc.

5.11 Subsection (4) provides for the power of the Minister to dismiss complaints which are without substance. However, where the Minister determines that the Authority has failed to comply with any applicable measure, he/she may order the Authority to comply with it within a specified period. Whether the Minister may ultimately take the matter further in a court of law, is to be doubted on the basis of considerations of administrative law. As a principle of sound policy, it is suggested that disputes between the Minister and the Authority should be settled between themselves because any formal steps which the Minister may take against the Authority could completely undermine all confidence in the Authority.

5.12 Subsection (5) provides for the Ministerial power to appoint a commission to investigate more complicated cases. (It is submitted that the word “commission” should rather be understood as a reference to a body consisting of more than one person.) The powers and procedures of such a commission would largely be the subject of regulations contemplated in subsection (6) and which must still be promulgated. Provision is made for the costs of a commission in subsection (7) as a matter for the budget of the Transport Ministry, the rationale being that a commission is merely an extension of the Minister.

Section 24 : State land may be made available to the Authority

5.13 Section 24 empowers the Minister to make state land, any facilities on such land (it is submitted that offices may be a case in point) and any movable property available to the Authority for the exercise and performance of its

duties, functions and powers. Terms and conditions may be agreed upon to avoid any implied form of subsidy benefiting road users. Whilst the transfer of assets under section 27 is considered to be a “once-off” transaction, section 24 opens the door for appropriate State assistance at any stage whatsoever. Transfers of assets under section 24 would, however, not qualify for the “privileges” and transitional measures provided for in section 27(2) to (8) which are attached to the transfer of assets under section 27. The “relevant competent authority” referred to in the section is a reference to any functionary in the Government structure whose consent would, in terms of State financial legislation and policies and the Treasury Instructions, have to consent to the transaction.

Section 25 : Delegation of powers

5.14 This section enhances the flexibility of the Act by permitting the exercise of powers by alternate functionaries. In the first place it permits delegation from Ministerial level to the board or even directly to the chief executive officer, secondly from the board to the chief executive officer or any other employee, and thirdly from the chief executive officer to any other employee. The delegating functionary may, however, still exercise the function himself/herself, and, in accordance with general principles concerning delegations, even override any action taken by the delegee in the name of the delegating functionary. It is submitted, however, that the protection of proprietary rights offered by Article 16 of the Namibian Constitution would effectively prevent any action with retrospective effect by the original delegating functionary which may affect vested rights which any third party acquired through the actions of the delegee.

5.15 The section does not explicitly permit subdelegation of delegated powers, but it is suggested that such authority should be granted to the delegee via the conditions of delegation in appropriate circumstances.

5.16 Delegations should never be made in cases where they would frustrate the objects of the Act, e.g. in respect of powers which should for the sake of “check and balance” safeguards, rather vest in both the superior and the subordinate functionary. Whilst the present section concerns delegations within the same hierarchy, section 15(3)(b) aims at delegations empowering “outside” contractors.

Section 26 : Regulations

5.17 Regulations may be made in connection with the matters listed in paragraphs (a) to (d) and which will form an important “extension” of the Act

5.18 . It is submitted that the ostensible wide impact of paragraph (c) should not be overrated, as if it would empower the Minister to prescribe to the Authority in detail as to how and when it should act. Such an interpretation would be contrary to the spirit and objectives of the Act. The Authority cannot function effectively if undesirable restraints are placed upon its activities. On the other hand, it would be completely in line with the ordinary meaning of the words of the paragraph and the nature of the relationship between the Minister and the Authority, if the Minister were to issue guidelines to the Authority from time to time on strategies to be implemented and on matters of policy. This would be especially important in cases where the Authority is involved in operations relating to any road which is not funded by the Road Fund Administration.

5.19 Paragraph (d) is an open ended provision which leaves much scope for regulations on a variety of matters not regulated elsewhere in the Act. However, anything enacted under the authority of the paragraph must still be reconcilable with the intent of the Act as interpreted purposively and contextually.

Section 27 : Transitional provisions

5.20 The purposes of this section are to empower the Authority to properly perform its functions by transferring the necessary state assets to it, and to provide for transitional matters pursuant to the transfer of functions from the Ministry to the Authority. The transfer of assets contemplated in this provision which was effected on 1 April 2000 as a once-off transaction, based on a unilateral administrative act on the part of the Minister responsible for Transport

(since Transport assets were involved), in consultation with his colleague, the Minister of Finance (responsible for all financial affairs affecting the State). Although subsection (1) conferred a subjective discretion on the Transport Minister to determine the extent of the assets and liabilities to be transferred, the sum total of these had to be sufficient to reasonably enable the Authority to perform its functions under the Act. It is interesting to note that the subsection explicitly refers to the assets and liabilities which the State used in its management of roads (cf. the definition of management in section 16(1)), and which underscores the fact that the mission of the Authority is to undertake a substantial part of the functions which the State had previously performed through its Ministry responsible for Transport. It is submitted that since the Authority is, in principle a body which is funded and does not actually generate its own finances (see sections 17 and 20 of the Road Fund Act, 1999), it would serve little purpose to transfer liabilities to it. On the other hand, it must be assumed that financial obligations are usually part and parcel of contracts with the Ministry had entered into with third parties in connection with roadmaking activities, and that it was considered useful to transfer these obligations to the Authority as an inherent part of the contract (see subsection (6)).

5.21 Subsection (2) has interesting implications for the law of property because it means that, that despite the fact that property such as immovable property can, in accordance with general principles and the Deeds Act, 1937, only be transferred after proper survey and registration of a deed in the Deeds Office, such property nevertheless vested in the Authority on the transfer date. The question as to the identity and extent of such property, which is of course a question of fact, is fortunately settled by a Ministerial certificate issued under subsection (3). The result of the fact that the actual transfer of immovable property is brought about by operation of statute, is that the endorsement effected by the Registrar of Deeds under subsection (4) is merely an ex post facto correction of the records. It therefore seems that the phrase “necessary to effect the transfer in the name of the Authority” in subsection (4) is somewhat difficult to reconcile with subsections (2) and (3).

5.22 Although subsection (5) protects transferred property against the threat of acquisitive prescription, the same does not hold true in the case of property acquired by the Authority for the performance of its functions at a later stage.

5.23 Subsection (7) entitles the Minister to determine the value of the property transferred unilaterally. The subsection, however, does not specify any time-frame within which this should be effected nor the exact purposes of the valuation, other than the obvious deduction which one must make, viz. that it is important for State financial and bookkeeping purposes. For as long as the Authority is a “funded entity” which merely renders a public service without generating an income in the ordinary sense of the word (i.e. compensation which exceeds its costs), such valuation would certainly not be of any importance for taxation purposes. This view is in line with subsection (8), which exempts the Authority from any form of taxation in respect of assets transferred to it.

5.24 Subsection (9) was of particular importance to staff members of the Public Service attached to the Authority and whose duties resorted under the functions transferred by the Act to the Authority. It is made clear that no person could be transferred without his or her consent, although he or she may be seconded to the Authority under the provisions of the Public Service Act, 1995.

5.25 The extent of work which is “reserved” for the Roads Contractor Company for a period of three years is dealt with in subsection 27(10)

Section 28 : Short title and commencement

5.26 It has already been mentioned that the Act partially commenced on 25 October 1999 and finally on 1 April 2000. The section was framed so as to facilitate the phasing-in of the Act, so as to first pave the way for the designing and implementation of the organisational aspects of the Authority, and thereafter commence with operations.

Copy of the Roads Authority Act, 1999 (Act No. 17 of 1999)

ACT

To establish a Roads Authority to manage the national road network of Namibia; and to provide for matters incidental thereto.

(Signed by the President on 6 October 1999)

ARRANGEMENT OF SECTIONS

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PRELIMINARY PROVISIONS

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3. Objects of the Authority
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5. Disqualification for appointment as director
6. Tenure of office of directors
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8. Alternate directors
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- 28. Short title and commencement

BE IT ENACTED by the Parliament of the Republic of Namibia, as follows:-

PART I
PRELIMINARY PROVISIONS

Definitions

1. In this Act, unless the context otherwise indicates -

“Administration” means the Road Fund Administration established by section 2 of the Road Fund Administration Act;

“Authority” means the Roads Authority established by section 2;

“board” means the board of directors appointed under section 4;

“chief executive officer” means the person appointed under section 14 as chief executive officer of the Authority;

“committee” means a committee established under section 12;

“director” means a member of the board;

“Minister” means the Minister responsible for Transport;

“national road network” means the road network consisting of every trunk road, main road and district road proclaimed in terms of Chapter III of the Roads Ordinance;

“performance statement” means a performance statement referred to in section 18;

“prescribed” means prescribed by regulation;

“procedures agreement” means a procedures agreement referred to in section 17;

“Road Fund” means the Road Fund established by section 16 of the Road Fund Administration Act;

“Road Fund Administration Act” means the Road Fund Administration Act, 1999;

“Roads Ordinance” means the Roads Ordinance, 1972 (Ordinance No. 17 of 1972);

“staff member” means a staff member as defined in section 1 of the Public Service Act, 1995 (Act No. 13 of 1995);

“this Act” includes the regulations made thereunder;

“transfer date” means the date determined by the Minister under section 27(1).

PART II

THE ROADS AUTHORITY

Establishment of the Roads Authority

2. There is hereby established a juristic person to be known as the Roads Authority.

Objects of the Authority

3. Subject to this Act and the Road Fund Administration Act, the object of the Authority is to manage the national road network in accordance with section 16 with a view to achieving a safe and efficient road sector.

Board of directors

4. (1) There shall be a board of directors of the Authority which shall, subject to this Act, be responsible for the policy, control and management of the Authority.

(2) The board shall consist of not less than three and not more than five directors who shall be appointed by the Minister, subject to section 5, from amongst persons who have expertise relevant to the functions of the Authority and of whom the majority shall be persons who are not staff members.

- (3) The Minister shall appoint the chairperson of the board from amongst the directors.

(4) The names and nationality of the persons appointed as directors and the date of their appointment shall be notified in the *Gazette*.

Disqualification for appointment as director

5. A person shall not qualify for appointment as a director if he or she -
- (f) is an unrehabilitated insolvent; or
 - (g) has during the period of ten years immediately preceding the date of commencement of this Act, or at any time after that date, been convicted of a criminal offence and sentenced to imprisonment without the option of a fine.

Tenure of office of directors

6. Subject to section 7, a director shall hold office for a period of three years, and shall, at the expiry of such period, be eligible for re-appointment.

Vacation of office and filling of vacancies

7. (1) A director shall vacate his or her office if he or she -
- (a) resigns that office by written notice to the Minister;
 - (b) has been absent from three consecutive meetings of the board without the permission of the chairperson of the board;
 - (c) becomes subject to a disqualification referred to in section 5; or
 - (d) is removed from office by the Minister under subsection (2).
- (2) The Minister may, by notice in writing, remove a director from office if the Minister, after giving the director a reasonable opportunity to be heard, is satisfied that such director -
- (a) is incapacitated by physical or mental illness; or
 - (b) for any other good reason, is unable or unfit to discharge the functions of a director.
- (3) If a director dies, or his or her office becomes vacant in terms of subsection (1), the Minister shall, with due regard to section 4(2), appoint a person to fill the vacancy for the unexpired portion of the term of office of the director in whose stead he or she is appointed.
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Alternate directors

8. The Minister may, with due regard to section 4(2), appoint for each director a person as alternate director to act in the place of the director in the event of that director's absence or inability to act as a director.

Meetings of the board

9. (1) The first meeting of the board shall be held at such time and place as the Minister may determine, and thereafter, subject to subsection (2), meetings of the board shall be held at such times and places as the board may determine, but at least one such meeting shall be held every three months.

(2) The chairperson of the board shall convene a special meeting of the board when -

- (a) the Minister in writing requests him or her to do so; or
- (b) at least two directors in writing request him or her to do so.

(3) The chairperson of the board shall place on the agenda of a meeting of the board any matter pertaining to the functions of the Authority which the Minister in writing has requested to be considered and decided by the board at that meeting.

(4) The chairperson of the board or, in his or her absence, such director as the directors present shall elect, shall preside at a meeting of the board.

(5) Three directors shall form a quorum at a meeting of the board.

(6) A decision of a majority of the directors present at a meeting of the board shall be the decision of the board and, in the event of an equality of votes, the person presiding at the meeting shall have a casting vote in addition to his or her deliberative vote.

(7) The board may permit any person, other than a director, who has an interest in any matter due to be considered at that meeting, or any representative of that person, to attend and to take part in such discussions of the board as in the opinion of the person presiding relate to such matter, but such person or representative shall not be entitled to vote.

(8) A decision of the board shall not be rendered invalid by reason only of a vacancy on the board or of

the fact that a person who is not entitled to sit as a director did so sit when the decision was taken, if such decision was taken by the requisite majority of the directors who were present at the time and entitled to vote.

(9) The chairperson of the board shall cause a record to be kept of the proceedings of its meetings, and shall cause that record to be submitted to the Minister as soon as possible after a meeting of the board.

(10) The board shall determine the procedure to be followed at its meetings.

Disclosure of interest

10. (1) If a director or an alternate director or a member of a committee, not being a director or alternate director, or his or her spouse, or any company, close corporation or partnership of which he or she or his or her spouse is a director, shareholder, member or partner, is in any way directly or indirectly interested in a contract entered into or proposed to be entered into by the Authority, or in any other matter which is the subject of consideration by the board and which may cause a conflict of interests in the performance of his or her duties as director, alternate director or committee member, he or she shall fully disclose the nature of such interest as soon as possible after the commencement of the meeting of the board or a committee at which that contract, proposed contract or other matter is a subject of consideration, and that director, alternate director or member of the committee shall not take part in the consideration of, or vote on, any question relating to that contract, proposed contract or matter.

(2) If a director, an alternate director or a member of a committee referred to in subsection (1) fails to disclose a conflict of interest as required by that subsection and is present at a meeting of the board or a committee, or in any manner participates in the consideration of, or vote on, any question relating to the contract or other matter referred to in subsection (1), the proceedings in relation to that contract or matter shall, as soon as such non-disclosure is discovered, be rendered invalid and thereafter be reviewed by the board or the committee, as the case may be, in the absence of the director, alternate director or committee member concerned.

(3) A person who knowingly fails to comply with subsection (1) shall be guilty of an offence and be liable on conviction to a fine not exceeding N\$8 000 or to imprisonment for a period not exceeding two years or to both such fine and such imprisonment.

(4) If a person is convicted of an offence in terms of subsection (3), the court convicting that person shall summarily enquire into, and determine the monetary value of, any advantage or potential advantage which that person has or could have gained in consequence of that offence.

(5) Any person referred to in subsection (4) shall on conviction, and in addition to any fine or

imprisonment imposed in terms of subsection (3), be liable to a fine not exceeding three times the value of the advantage or potential advantage determined in terms of subsection (4), or to imprisonment for a period not exceeding fifteen years or to both such fine and imprisonment.

(6) A magistrate's court shall have jurisdiction to impose an additional penalty referred to in subsection (5) even though that penalty may, either alone or together with any other punishment imposed by the court, exceed the punitive jurisdiction of a magistrate's court.

Allowances

11. (1) There shall be paid to a director and an alternate director and a member of a committee, not being a director or alternate director, in respect of his or her services, out of the Road Fund, such allowances as the board, in consultation with the Minister, may determine.

(2) Different allowances may be determined under subsection (1) according to the different offices held by the persons concerned or the work performed by them.

Committees of the board

12. (1) The board may from time to time establish any committee to assist the board in the performance of its functions, subject to such conditions and procedures as the board may determine.

(2) The board may appoint as a member of a committee any person who is not a director, but at least one member of every committee shall be a director.

Restriction of liability

13. A director, an alternate director or a member of a committee shall not be personally liable for any loss or damage arising out of, or in connection with, the performance of his or her duties, unless the loss or damage is due to his or her wilful misconduct, gross negligence or failure to comply with any provision of this Act or a direction or decision given thereunder.

Chief executive officer and other employees

14. (1) The Authority, in consultation with the Minister, shall appoint a person who has expertise relevant to the functions of the Authority as chief executive officer of the Authority.

(2) The chief executive officer shall be responsible for the administration of the affairs of the Authority in accordance with the policies and directions of the board.

(3) The Authority may appoint such other employees as it considers necessary to assist the chief executive officer.

(4) The Authority in consultation with the Minister shall determine the remuneration and other conditions of service of its employees, including conditions of service in respect of medical aid, housing, gratuities and pension benefits.

(5) Section 10 shall *mutatis mutandis* apply to the chief executive officer.

Functions of the Authority

15. (1) Subject to this Act, the functions of the Authority are to -

(f) manage, subject to section 16, the national road network;

(g) make recommendations to the Minister regarding the application of this Act, amendments to it and the making of regulations; and

(h) advise and assist the Minister or an approved authority, as defined in section 1 of the Road Fund Administration Act, on such conditions as may be agreed upon, or any other person, subject to the approval of the Minister and on such conditions as the Minister may determine, in regard to -

(i) any matter relating to the planning, design, construction and maintenance of roads, whether such roads are part of the national road network or not; or

(ii) the exercise of any power or the performance of any duty which the Minister or any such approved authority or such person may or is required to exercise or perform under this Act or any other law.

(2) Subject to this Act, the Authority may -

(a) with the consent of the Minister, form one or more companies under the Companies Act, 1973 (Act No. 61 of 1973), to undertake any of the functions of the Authority;

- (b) open banking accounts with banking institutions;
- (c) acquire, hire and improve property required for the performance of the functions of the Authority and dispose of any such property, but the Authority shall only acquire or dispose of immovable property with the consent of the Minister and subject to such conditions as the Minister may determine; and
- (d) exercise such other powers or perform such other duties as may be provided for in this Act or in any other law and do all such things as the Authority considers necessary or expedient in order to achieve the objects of this Act.

PART III

MANAGEMENT OF ROAD NETWORK

Management of road network

16. (1) Notwithstanding anything to the contrary contained in any other law, but subject to this Act and with due regard to the funds at its disposal, the Authority shall undertake the management of the national road network, including -

- (a) the planning, designing, construction and maintenance of roads which are part of the national road network;
- (b) the quality control of materials required for the proper construction and maintenance of roads;
- (c) the supervision of work contracted out in terms of subsection (2);
- (d) the operation of road management systems;
- (e) subject to any other law, the prevention of the excessive damaging of roads by road users or any other parties; and
- (f) the performance of any other function assigned to it by or under any law, or by the Minister by notice in the *Gazette*, which is necessary in order to achieve the objectives of this Act or for any purpose relating to road traffic or road transportation.

- (2) Subject to subsection (3), the Authority may -
- (a) enter into an agreement with any person, body or authority to perform any act or provide any service for or on behalf of the Authority in respect of any matter related to the functions of the Authority; and
 - (b) in writing delegate any of its powers, including any delegated power, to the person, body or authority referred to in paragraph (a) if the Authority considers it necessary for the efficient performance of any such act or the provision of any such service.
- (3) Subject to section 27(10), the Authority shall not itself undertake any work for the construction or maintenance of any road but shall cause such work to be done by any outside contractor with whom the Authority has entered into a contract for the purpose.
- (4) The Minister, after consultation with the Authority, may give the Authority a written direction to undertake any road project or programme which the Minister considers necessary in the national interest for improving accessibility to or within any area in Namibia, and the Authority shall comply with a direction so given, but subject to the funding of such project or programme from moneys made available either through an appropriation by Parliament or any other source as may be agreed upon by the Minister, the Authority and the Administration.
- (5) The Minister may prescribe minimum standards and measures for the management of the roads comprising the national road network, and minimum standards for the maintenance of such road network which are reasonably required to -
- (a) achieve a safe road system;
 - (b) ensure compliance with the international obligations of the State; or
 - (c) cause the least possible disruption of the environment, but subject to the provisions of any other law.
- (6) Notwithstanding anything to the contrary contained in the Roads Ordinance, the Minister, in consultation with the Authority, shall, by notice in the *Gazette*, and subject to the conditions, qualifications or exceptions as may be specified in the notice, transfer to the Authority all powers and duties, excluding a power to make regulations or to hear an appeal, conferred or imposed on the Minister or any other functionary by that Ordinance which relate to the functions of the Authority and are required to be vested with the Authority to enable it to perform its functions under this Act efficiently.
-

(7) Notwithstanding the provisions of any other law, the Authority shall be entitled to approach any competent court in order to seek an award for compensation against any person alleged to be responsible for the damaging of a road managed by the Authority.

Procedures agreement

17. (1) Within two months after the transfer date, or such longer period as the Administration may determine, the Authority shall, in accordance with such procedures as the Administration may stipulate, submit to the Administration a draft procedures agreement containing such particulars as are necessary to enable the Administration to assess whether funds accruing to the Authority will be efficiently utilized by it for the performance of its functions, including -

- (a) the management and financial systems to be implemented by the Authority, and measures to be introduced by it to ensure -
 - (i) compliance with the rules and principles contemplated in section 19(2) of the Road Fund Administration Act; and
 - (ii) the efficient utilisation of funds allocated to it in respect of projects and programmes included in the business plan referred to in section 21 of the Road Fund Administration Act;
- (b) the principles to be applied in budgeting for administrative expenditure, including the cost of acquiring immovable property for administrative purposes;
- (c) the procedures to be followed by the Authority in the calling for, and the evaluation and awarding of, tenders and in the negotiation of agreements with, any person, body or authority referred to in section 16(2); and
- (d) any other matter relating to the performance of the Authority's functions under this Act which the Administration may require.

(2) The Administration shall approve a draft procedures agreement either without amendments or with such amendments as may be effected in consultation with the Authority.

- (3) Upon approval of the draft procedures agreement by the Administration, it shall be signed by the

chairperson of the board of directors of the Administration and the chairperson of the board of the Authority.

(4) The Authority and the Administration shall review the procedures agreement from time to time, but at least once every three years.

(5) Before finalising a draft procedures agreement or an amendment to it, the Authority shall consult with such interested parties as the Minister may determine.

(6) The Authority shall -

- (a) make a copy of a procedures agreement and every amendment thereof available for public inspection at its office; and
- (b) cause it to be published, in such form as the Minister may determine, in at least two daily newspapers circulating nation-wide.

Performance statement

18. (1) Within two months after the transfer date, or such longer period as the Minister may determine, the Authority shall submit to the Minister a draft performance statement containing such particulars as will enable the Minister to assess the performance of the Authority, including-

- (a) the Authority's short and medium term operational objectives;
- (b) the general strategy which the Authority intends to employ in order to achieve its objectives;
- (c) the manner in which the Authority will implement the standards and measures prescribed under section 16(5);
- (d) the principles which will be applied by the Authority in relation to its policies of appointment and promotion of staff of the Authority; and
- (e) particulars of any other matter relating to the performance of the Authority's functions under this Act as may be required by the Minister.

(2) The Minister shall approve a draft performance statement either without amendments or with such

amendments as may be effected in consultation with the Authority.

(3) Upon approval of the draft performance statement by the Minister, it shall be signed by the Minister and the chairperson of the board.

(4) The Authority and the Minister shall review the performance statement from time to time, but at least once every three years.

(5) Before finalising a draft performance statement or an amendment to it, the Authority shall consult with such interested parties as the Minister may determine.

(6) The Authority shall -

(a) make a copy of a performance statement available for public inspection at its office; and

(b) publish it, in such form as the Minister may determine, in at least two daily newspapers circulating nation-wide.

PART IV

FINANCIAL AND GENERAL PROVISIONS

Funds of the Authority

19. (1) The funds of the Authority shall consist of such moneys as may be obtained by the Authority-

(a) by virtue of any allocation made to it by the Administration under Part III of the Road Fund Administration Act;

(b) by virtue of any appropriation made by Parliament;

(c) by virtue of any donation or grant made to the Authority; or

(d) from any other source.

(2) Any amount which is derived by the Authority from the sale of any assets of the Authority shall, to

the extent and in the manner as may be agreed upon between the Authority and the Administration, be paid over to the Fund or be applied in such other manner as may be agreed.

Financial year

20. The financial year of the Authority shall be the same as that of the Administration as determined in terms of section 23 of the Road Fund Administration Act.

Accounting and auditing

21. (1) The Authority shall keep such accounting records as are necessary to reflect fairly the state of affairs and business of the Authority and to explain the transactions and financial condition of the Authority.

(2) The accounting records and financial statements of the Authority shall reflect specifically any amounts received by virtue of an appropriation by Parliament or any grant or donation made for the purpose of a specific project or programme and the amounts expended in connection with such project or programme.

(3) The accounting records and the financial statements of the Authority and of every company formed by it in terms of section 15(2)(a) shall be audited annually, to the satisfaction of the Auditor-General and subject to such directives as he or she may issue, by a person registered as an auditor in terms of the Public Accountants' and Auditors' Act, 1951 (Act No. 51 of 1951) and appointed by the Authority in consultation with the Auditor-General.

Annual report

22. (1) Within six months after the end of each financial year the Authority shall submit to the Minister a report on the activities of the Authority during that financial year.

(2) The report shall contain -

(a) particulars of projects and programmes relating to -

(i) advice furnished or assistance rendered in terms of any agreement contemplated in section 15(1)(c); and

(ii) the management of the national road network as contemplated in section 16(1);

-
- (b) an assessment by the Authority of its achievements in relation to its performance statement; and
 - (c) such other matters as the Minister may require.

(2) The Authority shall submit to the Minister, together with the report referred to in subsection (1), the audited financial statements of the Authority and of each of its subsidiary companies, including the auditor's report on those statements.

(3) The Minister shall lay -

- (a) the annual report referred to in subsection (1);
- (b) the financial statements and the auditor's report referred to in subsection (2); and
- (c) the relevant performance statement and any amendment thereof,

upon the Table in Parliament within 28 days after receipt thereof if Parliament is in session or, if Parliament is not then in session, within 28 days after the commencement of its next ordinary session.

Failure of Authority to comply with certain provisions

23. (1) Any person who is of the opinion that the Authority has failed to comply with any provision of this Act, or a performance statement or a procedures agreement, may lodge with the Minister a written complaint, which shall -

- (a) set out the grounds of the complaint;
- (b) state the full names, the address and the interest of the complainant in the matter; and
- (c) if appropriate, be accompanied by any proof of the alleged failure which is in the possession of the complainant.

(2) On receiving a complaint in terms of subsection (1), the Minister shall send a copy thereof to the Authority.

(3) The Authority shall, within 14 days after receipt of a copy of the complaint in terms of subsection (2),

furnish the Minister with a written reply.

(4) After receipt of the Authority's reply in terms of subsection (3), and subject to subsection (5) the Minister may -

- (a) dismiss the complaint; or
- (b) if the Minister is satisfied that the Authority has failed to comply with the provision referred to in subsection (1), by written notice direct the Authority to comply with such provision within such period as may be determined and specified by the Minister in the notice.

(5) Where the Minister considers it necessary or desirable for the purpose of making a decision in terms of subsection (4), the Minister may appoint a committee, on such terms and conditions as he or she may determine, to investigate the complaint, to hear any representations made by the complainant and the Authority and to report to the Minister.

(6) The procedure for an investigation in terms of subsection (5) shall be as prescribed, and a committee referred to in that subsection shall, for the purpose of such investigation, have the prescribed powers with regard to the summoning and examination of witnesses and the production of books or objects.

(7) The costs incidental to the appointment of a committee and the conducting of an investigation in terms of subsection (5) shall be paid from moneys appropriated by Parliament for such purposes.

- (8) Any person who wilfully -
- (a) interrupts the proceedings of a committee referred to in subsection (5);
 - (b) hinders or obstructs such committee in the performance of its functions, or
 - (c) contravenes or fails to comply with any regulation referred to in subsection (6) relating to the duties or conduct of persons summoned to appear before a committee referred to in subsection (5) to give evidence or produce any book or object.

shall be guilty of an offence and on conviction be liable to a fine not exceeding N\$2 000 or to imprisonment for a period not exceeding six months or to both such fine and such imprisonment.

State land may be made available to the Authority

24. Subject to this Act or any other law, the Minister may, in consultation with the relevant competent authority, and subject to such terms and conditions as may be agreed upon, make State land or land controlled by the State or any other facility on that land or any other movable property of the State available to the Authority for the performance of the functions of the Authority.

Delegation of powers

25. (1) Subject to this Act -
- (a) the Minister may, on such conditions as he or she considers appropriate, delegate in writing to the board or the chief executive officer any power conferred upon him or her by this Act, excluding the powers conferred by section 26;
 - (b) the board may, on such conditions as it considers appropriate, delegate to a committee or the chief executive officer or any other employee of the Authority any power conferred upon it by this Act or delegated to it under paragraph (a);
 - (c) the chief executive officer may, on such conditions as he or she considers appropriate and with the approval of the board, delegate to any employee of the Authority any power conferred upon him or her by this Act or delegated to him or her under paragraph (a) or (b).
- (2) A delegation shall not prevent the exercise of the relevant power by the Minister, the board or the chief executive officer, as the case may be.

Regulations

26. The Minister may, after consultation with the Authority, make regulations in relation to -
- (a) any matter which in terms of this Act is required or permitted to be prescribed;
 - (b) the financial management and control of the affairs of the Authority;
 - (c) the manner in which the Authority may exercise any power or perform any duty or function in terms of this Act; or

- (d) any other matter which the Minister considers necessary or expedient to give effect to the objects of this Act.

Transitional provisions

27. (1) Subject to this section, the Minister, in consultation with the Minister responsible for Finance, and on such conditions as the Minister may determine, shall transfer to the Authority, with effect from a date determined by the Minister by notice in the *Gazette*, such assets, liabilities, rights or obligations of the State which relate to or are connected with the management of roads by the Ministry as may, in the opinion of the Minister, be required by the Authority.

(2) Notwithstanding any law to the contrary, the Authority shall, with effect from the transfer date, be vested with the ownership of the assets and rights and be charged with the liabilities and obligations transferred or assigned to it under subsection (1).

(3) A certificate issued by the Minister in which it is stated that any State land or a servitude or other real right or lease or any other asset or right described in such certificate has been transferred to the Authority in terms of subsection (1), shall be sufficient proof that the asset or right so described vests in the Authority.

(4) Upon the submission of a certificate referred to in subsection (3) to the Registrar of Deeds or to any other person in charge of any other office where a register or record of the ownership of or entitlement to an asset or right described in such certificate is being kept, the Registrar or such person shall make such entries in or on any relevant register, title deed or other document in his or her office or submitted to him or her as may be necessary to effect the transfer in the name of the Authority.

(5) Notwithstanding any law to the contrary, no servitude or other right of any kind in respect of State land transferred to the Authority in terms of subsection (1) shall be acquired by prescription.

(6) The Authority shall be substituted for the State as a contracting party in respect of any agreement transferred to the Authority in terms of subsection (1), without that substitution bringing about a novation of such agreement.

(7) The value of assets and liabilities transferred to the Authority in terms of subsection (1) shall be determined by the Minister after consultation with the Minister responsible for Finance.

(8) Notwithstanding any law to the contrary, no stamp duties, transfer duties, registration fees, sales tax, additional sales levy or any other duty, fee, tax or levy payable in terms of any law for the acquisition or transfer of assets or rights shall be payable in respect of the transfer of assets or rights by the State to the Authority in terms of subsection (1).

(9) Notwithstanding any law to the contrary, the Minister may, in consultation with the Prime Minister and in accordance with the provisions of an agreement concluded with the Authority, transfer to the Authority any staff member, but subject to the consent of the staff member concerned.

(10) The Authority shall -

(a) before the transfer date defined in section 1 of the Roads Contractor Company Act, 1999, entrust to the Department of Transport all work relating to the construction and maintenance of roads, to the extent that such work was executed by that department before that date; and

(b) during the first period of three years after the transfer date contemplated in paragraph (a), entrust to the company referred to in section 2 of that Act, all work contemplated in that paragraph,

except if the Authority and the Department or the company, as the case may be, with the approval of the Minister in a particular case, agree otherwise.

Short title and commencement

28. (1) This Act shall be called the Roads Authority Act, 1999, and shall come into operation on a date to be determined by the Minister by notice in the *Gazette*.

(2) Different dates may be determined under subsection (1) in respect of different provisions of this Act.

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