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## **SACCI POSITION ON THE INFRASTRUCTURE DEVELOPMENT BILL**

### **Introduction**

The South African Chamber of Commerce and Industry (SACCI) is the largest chamber of commerce in the Republic of South Africa. It represents some 17 000 companies through its membership which comprises more than 50 large corporates, 12 uni-sectoral associations and more than 50 chambers of commerce and industry and chambers of business located in towns and cities throughout the country. It is a multi-sectoral organisation and represents the interests of business in all sectors of the economy. While it has a core membership of large companies, numerically small and medium enterprises are by far its largest constituency.

The Economic Development Department (EDD) published the Infrastructure Development Bill with the stated goal of coordinating large infrastructure projects. There is a myriad of regulatory obstacles to the actual construction of an infrastructure network, for example environmental impact assessments, municipal and provincial competency differences, labour regulations and health and safety regulations. In this light a centralised coordination institution should in theory be able to alleviate the regulatory congestion. However, the primary requirement for such a coordinating body to function is that it is staffed by highly trained professionals from the construction industry, which does not seem to be the case. The risk of including such a body is that an already over-regulated area would incur yet another bureaucratic level. While SACCI recognises the earnest intention of the EDD to facilitate infrastructure development in South Africa, there is a variety of background issues that require attention rather than merely relying on political power to resolve regulatory backlogs. Similarly, the scope of the legislation is exceptionally wide and includes infrastructure programs that fall within the domain of the private sector (e.g. telecommunications) as opposed to government mandated networks (e.g. road and rail). This presents a unique challenge to the South African business community, as the suggestion is that government would now play a strategic role in managing the roll out of privately funded infrastructure, which in itself would impact on investor confidence.

SACCI appreciates the opportunity to comment on this proposed legislation, the details of which follow.

**November 2013**

## **General comments**

Infrastructure development is a significant policy issue that has attracted sufficient political will to be placed at the top of government priorities for the short to medium term. Given this impetus to drastically expand South Africa's infrastructure network, there is an acute appreciation of the regulatory hurdles that must be crossed in actual roll out. This Bill epitomises a policy response from government to address the plethora of regulations that delay infrastructure expansion. Before dealing with specific comments on the Bill, SACCI addresses the general background issues that would affect the workability of the policy initiative.

**First**, the underlying assumption of the Bill is that coordination amongst government officials would help to overcome the regulatory burdens facing infrastructure expansion. In turn, this implies that the regulatory environment is the key culprit behind the delays, as opposed to a lack of funding or skills deficits. This is a point with which the South African business community concurs.

Given this set of circumstances, the optimal way forward is to understand what constitute the regulatory hurdles. Consultation with the relevant stakeholders would assist in the identification of the specific regulations and laws that are causing problems. The next step would be to address each of these problems as a policy amendment. The creation of a bureaucratic process to iron out problems on an ad-hoc manner is purely a short term solution which ignores the systemic problem. The systemic problem therefore requires a systemic solution.

**SACCI suggests that the EDD engage in stakeholder consultations with industry representatives in order to identify the regulations that require amendment. A high level strategy on how these individual regulations will be addressed would add value to the process.**

**Second**, a significant assumption underlying the bill is that a number of bureaucrats would be able to influence the regulatory process through political power. SACCI concedes that political will is necessary in most cases to introduce or implement policy, but the complexity of most infrastructure projects means that even a colloquium of industry leaders would have difficulty in finding solutions in the time allowed for the processing of applications. However, allowing the South African business community representation on the various bodies would ensure that the work of the body would be eased due to an ensured technical capacity.

**Third**, because of the wide ambit and the specific wording of the Bill the possibility exists that wholly private sector infrastructure projects would now have to submit their applications to an additional bureaucratic level. This is anathema to the entire stated goal of the Bill to facilitate infrastructure development as it increases the administrative cost and delays. However, the existence of a voluntary one-stop-shop for infrastructure developers should provide some value.

**SACCI suggests that the consulting bodies include representatives from business and that the applications to these bodies are voluntary.**

**Fourth**, the Bill contains numerous bureaucratic levels, reporting mechanisms between these levels and powers and functions of each level. Due to the scope of the bureaucratic system that is created by the Bill, a number of issues have crept in. The primary problems are uncertainty over the relative authority and powers of the levels with regards to each other and existing government institutions, and redundant provisions in the Bill.

In order to ensure that policy translates to implementable law, the drafting of legislation must undergo sufficient rigour in order to ensure that each provision is unambiguous and contributes to legal certainty rather than detract from it. In this case the EDD may consider re-drafting the problematic areas in the Bill. SACCI recognises that these are exclusively technical errors that frustrate objectives which may be sensible, but the discipline of legal drafting must be maintained. Certain of these problematic issues have been identified in the specific comment section.

#### **Specific comments**

In **Section 2** (Objects of the Act) the Bill provides:

- (a) That the Presidential Infrastructure Coordinating Committee (PICC) must perform the functions provided for in the Bill
- (b) The identification and implementation of strategic integrated projects (SIPs) which are of significant economic or social importance

#### **SACCI comment**

Section 2(a) implies that the Bill has authority over the actions of the PICC. The PICC was created before the Bill by Presidential decree and is strictly speaking under the sole authority of the Presidency, unless such authority is delegated to the EDD. Just as the President cannot usurp the powers of the legislature, so the Bill cannot usurp the power of the executive, even though the President (executive) chairs the Commission.

**SACCI suggests that the provision be reworded in order to ensure that the authority over the PICC is properly founded.**

Section 2(b) implies that certain SIPs are not of significant economic or social importance, which raises the question as to the test of significance. In the alternative, the implication is that additional SIPs to the existing 17 SIPs, which need to be clarified as the current understanding is that the 17 have already been committed to and that no further SIPs will be implemented.

**SACCI suggests that the thinking around the planned SIPs be explained either within the provision or in a policy memorandum.**

In **Section 3 (PICC)** the Bill provides for the composition of the PICC, which includes the President, Deputy President, members of cabinet and Premiers of Provinces amongst others.

**SACCI comment**

As with the comment above regarding Section 2(a), there must be clarity over the authority of the legislation to prescribe the functions and composition of the PICC.

In the event that the Bill does have the authority to prescribe the PICC, a substantive comment is on the possible redundancy of the PICC given that it closely resembles existing governing structures like the Cabinet. In fact, the only difference between a Cabinet meeting and the PICC appears to be that a representative of SALGA will be present.

**SACCI suggests a rethink on the composition of the PICC in order to ensure efficient deliberation.**

**Section 6** provides for a Management Committee:

- (2) The Management Committee is appointed by the President
- (3) The Management Committee must manage the affairs of the Commission

**SACCI comment**

SACCI appreciates that the high-level discussions of the PICC should be augmented by an office, but this is already provided for by the Secretariat. On face value and without any explanation about why the Committee is necessary, this level seems to be redundant.

**SACCI suggests that the EDD provide an explanation for the creation of the Committee and its relation to the PICC in terms of authority in a policy memorandum to the Bill. In the alternative, the scrapping of the Committee would allay the problem of redundancy.**

**Section 7** provides for the requirements of a SIP:

- (1) A project qualifies as a strategic integrated project for the purposes of this Act if it is an installation, structure etc. specified in Schedule 1, it is of significant economic or social importance to the State, or it is above a certain prescribed monetary value.

Schedule 1 lists the following (amongst others)

- Airports
- ICT installations
- Mines
- Public Roads
- Industrial facilities

**SACCI comment**

A further uncertainty is whether purely private sector construction projects (e.g. Mines and Industrial facilities) will now also have to submit their applications to the PICC and the various bureaucratic processes included in this Bill. The wording of the bill implies that this is the case. As mentioned in the general comments section, such a situation would constitute an additional bureaucratic hurdle for the private sector and the best the PICC and the EDD can do is to make the application to the PICC for assistance completely voluntary. The test of whether the Bill is in fact improving efficiency in infrastructure development would be whether private actors voluntarily submit to the advice of the institutions created by it.

**SACCI suggests that a provision outlining that private infrastructure projects may voluntarily apply to the PICC or any other relevant bureaucratic level included in the bill.**

**Section 11** provides for the appointment and composition of a steering committee. The steering committee is the bureaucratic level closest to an infrastructure project and is supposed to host a multi-disciplinary team.

#### **SACCI comment**

SACCI recognises that the bulk of the coordination work will be done at steering committee level and that a significant amount of technical expertise would be required by the committee to perform its tasks. However, there is no mention of expertise or business representation on the committee. This is a grave error and an oversight of the significant resources which the private sector is willing to allocate to government in order to promote infrastructure development.

**SACCI suggests that Section 11 explicitly provides for representation by the South African business community.**

**Section 21** provides for the regulations that the Minister may make in terms of the Bill. Section 21(b) & (c) provides the following:

The Minister may, in consultation with the Commission, make regulations on the criteria that must be applied in the implementation of a SIP, relating to

- (i) Skills development,
- (ii) Green Economy,
- (iii) Employment creation,
- (iv) Youth Employment,
- (iv) Rural development, and
- (v) B-BBEE

(c) the monetary values in respect of SIPs

**SACCI comment**

These provisions are problematic as they intrude upon the functional areas of other Ministries and are therefore prone to constitutional challenge. The implication of this provision is also that a double standard in terms of legislation will be in effect, i.e. one set of rules for B-BBEE in the South African economy, and another for SIPs. This is clearly anathema to established constitutional principles of equality before the law and legal certainty.

**SACCI suggests that Section 21 (b) and (c) be deleted.**

**Closure**

SACCI appreciates the opportunity to present its views on the crucial matter of infrastructure development. SACCI trusts that the comments would lead to more efficient infrastructure development framework in South Africa.