

Honourable Yunus Carrim  
Chairperson, Standing Committee on Finance  
National Assembly  
By email [ycarrim@parliament.gov.za](mailto:ycarrim@parliament.gov.za)  
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May 30, 2018

Dear Sir,

### SUBMISSION ON PIC AMENDMENT BILL

We appreciate the extended opportunity to comment on the Public Investment Corporation Amendment Bill.

We limit our comments to sections of the Bill that impact on the free flow of information and freedom of the media, since these fall within our advocacy mandate – to help secure the information rights that are the lifeblood of our field, investigative journalism. We note, however, that information rights are indivisible and that whatever benefit there may be for investigative journalists also apply to the rest of the media and the public in general.

#### ABOUT AMABHUNGANE

The amaBhungane for Investigative Journalism NPC (amaBhungane) is a non-profit company founded in 2009 to develop investigative journalism so as to promote a free, capable media and open, accountable, just democracy. We pursue our objective through:

- **Our investigations programme:** developing best practice in our field by producing major investigative stories that are accurate and fair, advance methods and standards, set an example to the wider media, expose wrongdoing and enable people to hold power to account;
- **Investigations support programme:** to help others develop and practice investigative journalism.
- **Advocacy programme:** to help secure the information rights investigative journalists need to do their work.

As we practise investigative journalism, we are ideally placed to identify legal, policy and practical threats to the information flows that are the lifeblood of our field.

Our submission follows. We are available to elaborate in an oral presentation to the committee.

Yours faithfully,

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## PREAMBLE

The Public Investment Corporation (PIC) is the biggest single investor in the economy. It is a market mover and can make winners and losers via its investments.

The very extensive influence this creates in the economy gives it a power than can be used for the benefit of its clients and the broader public, or abused for individual benefit, market manipulation and political or factional patronage.

Up to now the PIC has operated under very limited oversight and disclosure provisions considering the enormous financial power that it exercises.

Recent media articles, based in part on leaks and in part on the examination of the limited public information that there is about the PIC's investments, suggest the fears of abuse are well founded.

For example, the PIC invested billions in Ayo Technologies and Sekunjalo Independent Media, and it nearly invested billions more in Sagarmatha Technologies. All three companies appeared to be seriously overvalued and all three are controlled by the same man.

Meanwhile, the PIC's CEO Dan Matjila has been publicly accused of channelling funds to a "girlfriend". The police are investigating.

Questionable and politically-motivated PIC investments are not a new phenomenon. For examples, read amaBhungane's reporting on Erin Energy (previously named Camac Energy) and the PIC's 2012 deal with Capitec's BEE consortium. Please refer to the articles in Annexure 1.

We are busy trying to scrutinise a number of other potentially problematic deals. But without transparency, holding the PIC to account is slow and difficult work, with only a limited chance of success.

Clause 2 of the Bill creates a substitute for Section 5 which would significantly broaden the mandate of the PIC to intervene in the economy for various public policy purposes.

Worthy as these purposes may be, they would also introduce greater subjectivity in decision-making. This in turn would reinforce the need for transparency of the PIC's investments and of its decision-making processes.

The Bill attempts to deal with disclosure, but in our view the proposed provisions are insufficient given the very real temptation to abuse the PIC's enormous financial muscle.

## RATIONALE FOR GREATER TRANSPARENCY

It is trite that transparency disincentivises the abuse of power and incentivises good decision-making.

But on what grounds could one dictate openness to an institution that in many ways is the equivalent of a private fund manager, which would be subject to very little transparency?

The answer is simple: GEPP, the PIC's main client, is a defined benefit fund, guaranteed by the state.<sup>1</sup> If PIC fails to satisfy GEPP's obligations to civil servant pensioners, the state has to make good.

This is a matter of great public interest as tax money will be used and as there may be potentially catastrophic knock-on risks to the entire economy.

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<sup>1</sup> Section 31 of the Government Employees Pension Law, 1996, provides: "This Law shall bind the State and the Government shall be responsible for meeting the obligations of the Fund, whether properly funded or not, in favour of its members, pensioners and beneficiaries..."

## TRANSPARENT SELECTION OF THE BOARD

Clause 3 of the Bill provides for the minister to appoint board members in consultation with Cabinet.

In keeping with other institutions that exercise significant public power and oversight, our view is that appointments to the PIC board should follow a public interview process conducted by the National Assembly.

Not only stakeholders, but also members of the public should be able to make nominations.

## DISCLOSURE PROVISIONS

The Bill makes three attempts to improve disclosure.

1. **The addition of subclause (5) after section 6(4) of the current Act, to provide for the publication of ministerial directives.**

The current Act provides:

- (4) The Minister may issue directives to the board regarding the management of the corporation if—
  - (a) it is in the public interest; or
  - (b) it is reasonably necessary to do so.

The addition would provide:

- (5) A directive contemplated in subsection (4) must be—
  - (a) based on the investment criteria set out in section 5 of this Act;
  - (b) tabled in the National Assembly;
  - (c) tabled before the depositors; and
  - (d) published on the website of the corporation, within 30 days from the date on which it was issued.

We **support** the proposal that any directive of the minister is tabled and published on the PIC's website within 30 days.

2. **The amendment by Clause 4 of Section 10 of the current Act to provide for the annual tabling and publishing of a report reflecting all investments of deposits, whether listed or unlisted.**

The amendment would add:

- (3) The corporation must, when investing a deposit on behalf of the depositor, invest in projects that will benefit the members of the respective depositor.
- (4) A report reflecting all investments of deposits, whether listed or unlisted, must annually be—
  - (a) submitted to the Minister for tabling with the annual report of the department; and
  - (b) published on the website of the corporation.

We **support** this disclosure. It is central to the transparency required.

We fail to understand Treasury/the PIC/the GEPF's objection to this proposal. It merely codifies the practice of the past two years, motivated by Treasury.

The above parties argued in their April 19 submission to the Committee:

*The PIC as asset manager should not be compelled to disclose information about another entity, i.e. its clients and that are also the assets owners (e.g. the GEPF) without consent.*

This argument appears to assume privileges for the GEPF which it as a public entity simply does not have. The GEPF is a creature of law – the Government Employees Pension Law, 1996, and related instruments (“GEP Laws”).

The GEP Laws already impose significant transparency provisions on the GEPF.

#### EXISTING TRANSPARENCY PROVISIONS IMPOSED ON GEPF

In terms of section 9(6) and 10 of the GEP Laws, the Minister of Finance shall submit to Parliament the GEPF’s annual financial statements, report of the auditors and a report by the board regarding the state of affairs, business and financial position of the of the GEPF, and the degree in which the objects of the GEPF have been furthered. Significant detail is required in the board report.

In terms of items 4.10.1 and 4.10.2 of Schedule 1 to the GEP Laws ("**Schedule 1**"), the board of the GEPF must cause to be published in the Government Gazette a report on the activities of the GEPF, including the financial statements of the GEPF; and remuneration paid to trustees.

In terms of item 4.10.3 of Schedule 1, a copy of the report must be made available to any member of or person who has an interest in the GEPF upon the payment of a fee.

The GEPF annual reports submitted by the Minister to Parliament can be readily accessed online at [http://www.gepf.gov.za/index.php/annual\\_reports](http://www.gepf.gov.za/index.php/annual_reports).

The annual financial statements ("**AFS**") of the GEPF are also published online as part of the annual reports. The AFS provide information in relation to the investment of the GEPF's assets.

The GEPF's AFS include detailed accounts relating to the GEPF's investments. The details of the top 10 investments per investment category are included in the schedules to the AFS.

As already noted, the state guarantees the GEPF’s obligation to beneficiaries, which is a matter of great public interest and of necessity imposes a transparency obligation on the GEPF and by extension the PIC.

As also noted, if the PIC’s investment mandate is broadened as proposed in Clause 2 of the Bill, then the PIC’s investment choices and their consequences are in any case a matter of direct public interest .

There is no indication that the PIC or the companies it invests in have suffered as a result of the last two rounds of disclosure.

We note that the amendment proposed by Clause 4 of the Bill does not specify which classes of information regarding the PIC’s investments should be disclosed. We assume this is a matter for regulation as provided for in Clause 7 of the Bill.

We welcome the proposal that the Minister must table draft regulations in the National Assembly for comment. We believe, however, that Clause 7 could be strengthened as follows:

- a) It should require public participation.
- b) It should require National Assembly approval.
- c) It should require that the minister must prescribe the classes of information to be disclosed in terms of Section 10(4).

In our view, classes of information to be disclosed should include:

- ✓ significant equity acquisitions and disposals;
- ✓ the price paid (received for disposals);
- ✓ the extent of any discount;
- ✓ the external fees associated with the transaction and to whom they were paid;

- ✓ the value of the investment as of a designated cut-off date and the associated current profit/loss;
- ✓ any debt financing and their terms;
- ✓ the risk profile of the investment;
- ✓ the level/percentage of control exercised by the PIC;
- ✓ the identity of any board representatives appointed by the PIC;
- ✓ the identity and nature of any conflict disclosures relating to the investment;
- ✓ the identity of the promoters of any investment opportunity.

**3. The insertion by Clause 4 of a Section 11A, requiring the publication of any significant transactions requiring approval in terms of the PFMA and other legislation.**

The insertion would add:

11A. (1) The corporation must annually report on the total number and details of requests made to the Minister for approval of any significant transactions requiring such approval in terms of the Public Finance Management Act, 1999 (Act No. 1 of 1999), or in terms of any other legislation, together with an indication of which of those requests were granted.

(2) The corporation must submit the report contemplated in subsection (1) to the Minister for tabling together with the annual report of the department.”.

As we understand it, this provision seeks to promote transparency with regard to the extent of the PIC investment in other public entities or their debt, including government and parastatal bonds. If our understanding is correct, we **support** this initiative.

This is particularly relevant given the extent of the PIC/GEPP’s exposure to SOCs like Eskom, whose potential default may cause systemic economic risk.

**EXTENDING DISCLOSURE**

In leaked information that has come to light, we have seen that internal concerns, such as those raised by the Risk Committee, have been ignored.

To that end we propose a provision enabling public access to records of the PIC’s investment decisions. This would include board, portfolio and investment committee minutes in so far as they deal with investment decisions.

We note that PAIA may not be the appropriate mechanism for such access, given that Section 44, *Operation of Public Bodies*, allows a public body to refuse access to records containing inter alia:

*(ii) an account of a consultation, discussion or deliberation that has occurred, including, but not limited to, minutes of a meeting for the purpose of assisting to formulate a policy or take a decision in the exercise of a power or performance of a duty conferred or imposed by law.*

We recommend a dedicated provision with the following features:

Any member of the public may request, and the PIC must provide within seven days, any minute of a decision regarding a PIC investment, provided that:

- a) A prescribed period must have passed after the investment was made;
- b) Disclosure may be refused for reasons of commercial confidentiality, subject to all reasonable efforts to redact the relevant records on the same grounds;
- c) Any records that are already publicly available in some form may not be refused;
- d) Where there is an overriding public interest, records may not be refused.