**SUBMISSIONS ON THE PIC AMENDMENT BILLS, 2018**

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| **CLAUSE** | **COMMENT** | **COMMITTEE’S DECISION** |
| **General** | **Amabhungane**  Amabhungane submit that in terms of the information they have, they have seen that internal concerns, such as those raised by the Risk Committee, in the PIC, have been ignored. As a result, they 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. They note that the Promotion of Access to Information Act, 2000 may not be the appropriate mechanism for such access, given that section 44 of that Act titled “*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.”*  Amabhungane recommend a dedicated provision, in the Bill, 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:*   1. *(a) A prescribed period must have passed after the investment was made;* 2. *(b) disclosure may be refused for reasons of commercial confidentiality, subject to all reasonable efforts to redact the relevant records on the same grounds;* 3. *(c) any records that are already publicly available in some form may not be refused; and* 4. *(d) where there is an overriding public interest, records may not be refused.*” |  |
|  | **FEDUSA**  Committee Bill  FEDUSA submits that the GEPF has given the PIC an investment mandate. FEDUSA does not have knowledge of the terms of this mandate but submits that the terms of the mandate are highly relevant to the deliberations of the Committee on the proposed amendments to the PIC Act. FEDUSA urges the Committee to obtain a copy of the mandate. The mandate should reflect the investment policy determined by the Trustees and should reflect that the Trustees have applied their minds to, and acted in accordance with, their duties as set out particularly in Rule 4.1.19 of the GEPF. |  |
| **Clause 1** |  |  |
| **Clause 2** | **COSATU**    Committee Bill  COSATU strongly welcomes the proposed insertion in respect of the investment mandate of the corporation. They support it wholeheartedly and strongly urge the Committee to retain it in full. They submit that it is in line with COSATU’s proposed mandate for the PIC and they believe it is in line with the PIC’s commitment. It is also in line with the mandate given to the PIC by the GEPF, UIF and COIDA. |  |
| **FEDUSA**  Committee Bill  FEDUSA submits that this provision should be reconsidered. According to  FEDUSA it should be clearly expressed, in the proposed Bill, that the mandate is  subject to any investment mandate that may be given by any of the PIC investors.  The clause must be drafted in a way that allows the depositors to determine their  own investment mandate and must oblige the PIC to act accordingly. According to  FEDUSA the proposed amendment takes no account of, and appears not to  recognise, the duties of those pension funds to their members. Nor does it reflect the  long-term objectives of its largest client, the GEPF. There should be nothing in the  statute which permits the PIC to ignore or overrule or depart from the investment  objectives of its clients. FEDUSA further submits that the phrase “*securing*  *funds investments financial sustainability and security*” is vague and is inconsistent  with the investment mandate which should be given by pension funds to their  investment manager, and that is that the interests of the pension funds and their  members and beneficiaries should take precedence over any other interests.  *Clause2 proposed section 5(3)* – FEDUSA submits that the clause –“*The corporation may assist with financing the buying of property by the members of the GEPF*”, has no place in the PIC Act and should be deleted, as should the proposed definition of “property” in section 1. According to FEDUSA the Rules of the GEPF make no provision for assistance to members for buying property. It is inconsistent therefore for the PIC to provide that assistance using GEPF funds. A proper model for providing financial assistance to members of a pension fund in connection with immovable property is to be found in section 19(5) of the Pension Funds Act., 1956. The provision of such assistance is a matter for the pension fund and the employer who together have knowledge of a member’s financial position and needs. If the provision of such assistance is desired, then the GEPF Law and the GEPF Rules should be amended. |
| **TREASURY**  Committee Bill  In respect to clause 2 Treasury submits that the PIC makes investments (manages assets) on behalf of depositors (clients) and therefore it should only be required to act in accordance with the depositor's instructions. A depositor must give instructions in accordance with the legislation regulating that depositor. Any considerations to be taken into account by a depositor in its instructions to the PIC should be imposed on the depositor through its legislation. Any one or more of the considerations listed in the amendment of this clause may not necessarily accord with a depositor's instruction to the PIC.  *Financing the buying of property by the members of the GEPF*  In relation to the financing of the buying of property Treasury submits that - the PIC Act regulates the PIC's role as an asset or investment manager of deposits by depositors which is defined without identifying any specific depositors. This clause now mentions a specific depositor. The clause does not identify which funds may be used for this purpose. It could therefore entail the PIC's own funds, the GEPF's funds and/or the funds of another depositor. As to the use of the GEPF's deposits with the PIC, the GEPF should be the one instructing the PIC to so utilise its deposits. |
| **Clause 3** | **COSATU**  Committee Bill  *Appointment of the Board and the Chairperson*  COSATU submits that the existing PIC Act should be amended to remove the Minister’s *de facto* unilateral and sole discretion to appoint its Board. Currently the Act only requires the Minister to “consult cabinet colleagues” and to “give due regard” to depositor’ nominations”. These are not binding. Neither is it clear how depositor nominations would be made. They welcome and accept in full the proposals of the Committee Bill with regards to the appointment of the PIC Board.  COSATU further submits that they understand the need for the state to provide guidance for the PIC Board in the form of the Minister or Deputy Minister for Finance chairing the board.  *Composition of the Board*    COSATU welcomes the wording requiring the PIC Board to include a representative of each major depositor. This would ensure that the GEPF, UIF and COIDA designate representatives.  *Trade union representation*  COSATU submits that Unions must have representation on the PIC Board. Arguments that only chartered accountants, financial investment experts etc. must sit on boards is patronising and insulting to workers. For COSATU this is non-negotiable. Unions must legally be guaranteed meaningful PSCBC deployed representation on the PIC Board. Anything less will be met with vociferous rejection and counter mobilisation by COSATU.  In terms of the submission union representation should be selected by the Public Service Central Bargaining Council and in proportion to representation by unions at the PSCBC. COSATU strongly welcome and support the Committee Bill’s proposal for not less than 2 and not more than 3 union representatives selected by unions at the Public Service Central Bargaining Council in proportion to their composition.  Private Member’s Bill  COSATU submits that union representation needs to meaningful. One union representative as provided for in the Private Member’s Bill will be meaningless. They are of the view that the proposed wording of one union representative appointed by the Minister will be insufficient as he or she can easily be outvoted or marginalised or even bought. COSATU is also keen that the union representative should not be selected by a Minister as it could then be susceptible to being abused e.g. selecting someone based on friendship or from a small and marginal union or in exchange for favours. Union representative selected by the unions through the PSCBC will help to ensure accountability.  **FEDUSA**  Committee Bill  FEDUSA submits that the proposed subsection (1) contemplates a board consisting of 12 members – it is not clear whether the Minister would the 13th member of the Board and that should be clarified. FEDUSA further submits that the chairperson should not be the Minister or the Deputy Minister, but rather be appointed from amongst the members of the board appointed following the prescribed process**.** FEDUSA proposes that the Minister should be obliged to consult with depositors before making any appointments to the Board.  Private Member’s Bill  Chairperson - FEDUSA prefers the formulation of the Private Member’s Bill. As this excludes the idea that the Minister or the Deputy-Minister is to act as the chairperson.  Committee Bill  *Clause 3 proposed amendment to section 6(2)*  FEDUSA – submits that it is not acceptable that the obligation to have regard to nominations submitted by depositors is deleted in respect of the twelve members of the board. Since the PIC invests the assets belonging to the depositors it is fundamental that depositors should have their views heard on who is to manage their money. In addition, the Minister should be under a statutory obligation to call for nominations from depositors and members of the public and to have regard to those nominations in making any appointment. FEDUSA further submits that what makes a depositor a “*major depositor*” must be defined. According to FEDUSA since GEPF is by far the largest client of the PIC, and while its active or contributing members are represented by the trade union parties to the PSCBC, GEPF pensioners are not. It is proposed therefore that the list should include one pensioner member of the GEPF nominated by the GEPF.  Private Member’s Bill  FEDUSA - does not agree that the obligation to have regard to the nominations submitted by depositors should be deleted. FEDUSA goes further and submits that the Minister should be obliged to call for nominations, not only in relation to the appointment of the chairperson, but for all board appointments, and must then have regard to those nominations. The Minister should be obliged to consult with depositors before making any appointments.  Committee Bill  *Clause 3 proposed 6(2)(b)(iii)*  FEDUSA proposes that these members be nominated, not by reference to membership of the GEPF, but by the three trade unions in the PSCBC with the largest membership, as determined by the PSCBC vote weight determination procedures. The idea of “*proportional composition*” needs to be clarified. Is it proportional to the membership of each of the unions, or is it proportional to the members of the unions who are also members of the GEPF?  *Clause 3 proposed amendment to section 6(5)*  FEDUSA submits that the directive in section 6(4) relates to the management of the PIC if it is in the public interest to do so, and if it is reasonably necessary to do so. The proposed section 6(5)*(a)* is not acceptable unless the suggested changes are made to section 5 which submissions relate to the investment mandate. In addition, FEDUSA is of the view that there is little point in complying with this section after the directive is issued. The ability to issue directives of this nature is, in effect, giving the Minister the power to undermine the independence of the board of the PIC in a way which shareholders ordinarily are not able to do. It is important therefore that interested parties be given an opportunity to comment before directives are issued. |  |
| **Treasury**  Committee Bill  *Chairperson of the Board*  Treasury submits that the PIC Act and the Memorandum of Incorporation (Mol) do not specify who is to be appointed as chairperson of the Board. The Minister is the executive authority responsible for the PIC as a public entity listed in the Public Finance Management Act, 1999, and is also representing the State as the sole shareholder. The Board must account to the Minister and the Minister must account to Parliament for the entity. Therefore it is not advisable to have the Minister as the chairperson. It is proposed that the Act do not identify the chairperson and that the current provision that the Minister appoints the members of the board (including the chairperson and deputy chairperson) in consultation with Cabinet be retained. Should the Minister in consultation with Cabinet appoint the Deputy Minister as deputy chairperson, the appointment of an independent deputy chairperson, as advised by King IV, should be made. This has been the practice.  *Members of the Board*  Treasury proposes that the number of members be determined by the MoI or, if included in the Act that provision be made for no less than 10 and no more than 15 members, as currently provided in the MoI. This is to have sufficient members for the different committees of the Board. If the number of non-executive members is specified in the Act, it is proposed that only the Chief Executive Officer be identified as a member and that that the identity of the second executive to serve on the Board be determined by the Minister or the MoI.  *Union representation*  Treasury further submits that the meaning of major depositor should be clarified. What percentage of the value of investments managed by the PIC will be used for this purpose? According to Treasury the provision may mean that all the union representatives will be from one union. It is proposed that the two/three union representatives should be nominated by the two/three largest unions represented in the PSCBC.  Private Members' Bill  Treasury does not support the clause in the Private Member’s Bill that proposes a parliamentary process for appointment of board members. They support the Committee Bill, which retains the current arrangement.  *Clause 3 issuing of directives*  Treasury submits that the disclosure through tabling in the National Assembly and before depositors and also publication on the PIC's website is supported. The provision in clause 3*(b)* of the Committee Bill provides that the directives must be based on the investment criteria in the proposed section 5. Treasury submits that this reference may be unnecessary since the directives regarding the PIC's management does not apply to investment decisions by the PIC on behalf of depositors. |
| **Amabhungane**  *Appointment of the Board*  In respect of clause 3 Amabhungane submit that in keeping with other institutions that exercise significant public power and oversight, their view is that appointments to the PIC board should follow a public interview process conducted by the National Assembly. They further submit that not only stakeholders, but also members of the public should be able to make nominations.  *Tabling and publishing of a directive by the Minister*  Amabhungane supports the proposed amendment as it improves transparency. |
| **Clause 4** | **COSATU**  Committee Bill  COSATU submits that it is a massive blunder that the PIC is not currently legally required to submit annual and other reports to Parliament. This is not in line with the requirements placed upon other state entities and in fact in violation of government’s constitutional requirements. It is extremely dangerous given the size and role of the PIC in the economy and the crisis of state capture. COSATU welcomes the wording in the Committee Bill’s proposed provisions requiring the tabling of annual reports on all investments to the Minister and all Ministerial requests, for tabling at Parliament and for publication on the PIC’s website.  COSATU is sensitive to the confidential nature of investments at times e.g. before purchasing shares. However this should not mean a permanent secrecy. Once such investments have been done then there should not be any reasons that they cannot be included in such annual reports. They are comfortable with the proposed wording in the Committee Bill but feel it needs to be expanded to include major depositors. COSATU is of the view that there is one omission in this section. It does not provide for the tabling of reports and Ministerial directives to the PIC’s major depositors. 87% of the PIC funds come from the GEPF, 6% from the UIF etc. COSATU proposes that the PIC should be required to table its annual reports to its major depositors as well.  **FEDUSA**  FEDUSA - submits that the disclosure should be subject to any agreement with or mandate given by a depositor. |  |
| **Treasury**  In relation to clause 4 Treasury submits that the depositor like the GEPF must act in the best interests of its members, i.e. fulfil its fiduciary duties. The PIC must in turn act in accordance with the depositor's instructions. Therefore the obligation to ensure that investments are in the best interest of the beneficiaries of the depositor is that of the depositor and the depositor must also ensure the financial stability of the depositor as an entity. Depositors such as the Unemployment Insurance Fund and Compensation Fund do not have members.  Treasury further submits that – the disclosure of investments made on behalf of depositors should only occur with their consent. It should be considered whether the disclosure of investments is not a matter to be dealt with by depositors in accordance with applicable law, and not the PIC that acts on behalf of depositors. If this provision in the Bill is retained, it is proposed that it be subject to the depositor (client)'s consent and be limited to unlisted investments. The disclosure of listed investments is also not supported because it will entail a collation of all the listed investments with can influence the market. Other investors can very easily see what the PIC's positions and views of the market are, and that is risky since the PIC is the largest investor on the JSE. |
| **Amabhungane**  Amabhungane submits that the Bill attempts to deal with disclosure, but in their view the proposed provisions are insufficient given the very real temptation to abuse the PIC’s enormous financial muscle.  *Report on listed and unlisted investments*  Amabhungane supports the proposed disclosure. They submit that they fail to understand Treasury/the PIC/the GEPF’s objection to this proposal as it merely codifies the practice of the past two years, motivated by Treasury. They further state that GEPF laws already impose significant transparency provisions on the GEPF.  They wish to note that the amendment proposed in clause 4 of the Bill does not specify which classes of information regarding the PIC’s investments should be disclosed. In their 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; and  ✓ the identity of the promoters of any investment opportunity. |
| **Clause 5** | **FEDUSA**  FEDUSA submits that there must be a definition of “*significant transactions***”** mentioned in this clause. |  |
| **Amabhungane**  *Publication of any significant transactions*  Amabhungane support the insertion of thus clause to the Act. |
| **Clause 6** | **FEDUSA**  FEDUSA submits that this is a transitional provision and while the intention is clear, it needs to be worked out in greater detail. It is not known, for example, what the terms of office of current board members are. |  |
| **Clause 7** | **COSATU**  COSATU welcomes the Committee Bill’s wording guiding the formulation and tabling of regulations. This is critical for transparency.  COSATU proposes an amendment based upon the above proposals for the engagement of major depositors and the public when drafting regulations. This will be in line with the standard practice when drafting regulations across government. |  |
| **Amabhungane**  Amabhungane welcome the proposal that the Minister must table draft regulations in the National Assembly for comment. However they believe that Clause 7 could be strengthened as follows:   * 1. *(a)* It should require public participation.   2. *(b)* It should require National Assembly approval.   3. *(c)* It should require that the Minister must prescribe the classes of information to be disclosed in terms of section 10(4). |