



Submissions by Corruption Watch: Public Investment Corporation Amendment Bill

Introduction

1. Corruption Watch ("CW") is a non-profit civil society organisation. It is independent, and it has no political or business alignment. Corruption Watch intends to ensure that custodians of public resources act responsibly to advance the interests of the public. Its ultimate objectives include fighting the rising tide of corruption, the abuse of public funds in South Africa, and promoting transparency and accountability to protect the beneficiaries of public goods and services.
2. CW has a vision of a corruption free South Africa, one in which educated and informed citizens are able to recognise, report corruption without fear, in which incidents of corruption and maladministration are addressed without favour or prejudice, and importantly where public and private individuals are held accountable for the abuse of public power and resources.
3. As an accredited Transparency International Chapter in South Africa, core to our mandate is the promotion of transparency and accountability within the private sector and state institutions aimed at ensuring that corruption is addressed and reduced through the promotion and protection of democracy, rule of law and good governance.
4. CW welcomes the opportunity to make submissions on the Public Investment Corporation Amendment Bill, [B_2018] (the "Amendment Bill") read in accordance with the Memorandum on the Objects of the Public Investment Corporation Amendment Bill, 2018 ("Memorandum on Objects").
5. The Public Investment Corporation ("PIC") is the only investment manager in South Africa focusing exclusively on the public sector. It is a national government business enterprise listed in schedule 3 B of the Public Finance Management Act, 1 of 1999 ("PFMA") and wholly owned

by the South African Government with the Minister of Finance as the sole shareholder representative.

6. The PIC's major client is South Africa's largest pension fund, the Government Employees Pension Fund ("GEPF"). Other clients include the Unemployment Insurance Fund ("UIF"), the Associated Institutions Pension Fund ("AIPF"), the Compensation Commissioner: Pension Fund and the Compensation Commissioner Fund ("CC").
7. The South African public, particularly government employees are not only investors but also beneficiaries of PIC investments and have an interest in its good governance. Given recent media reports about the manner in which PIC funds may have been used to unlawfully benefit PIC employees as well as other politically connected persons,¹ it is of utmost importance that the provisions of the Bill be strengthened to ensure proper accountability, transparency and oversight in order to ensure that the scope for maladministration and/ or corruption is addressed.
8. We note that from the PIC website that the PIC adheres to good corporate governance in line with the King Code on Corporate Governance ("King III"), the Code for Responsible Investing in South Africa ("CRISA") as well as the UN Principles for Responsible Investments and the UN Global Compact. In this regard, the PIC's corporate governance policy ("PIC Governance Policy") deals with certain governance issues and proxy voting. We submit that the OECD Guidelines on Pension Fund Governance and Pension Fund Asset Management,² OECD Governance and Investment of Public Pension Reserve Funds in Selected OECD Countries,³ OECD Guidelines on Corporate Governance of State-Owned Enterprises⁴ and the ISSA Guidelines for the Investment of Social Security Funds,⁵ can also be considered as frameworks

¹ See <https://www.businesslive.co.za/bd/national/labour/2018-05-19-nhlanhla-nene-looks-afresh-at-corruption-allegations-against-pics-dan-matjila/> and <https://www.businesslive.co.za/bd/national/2018-06-27-bantu-holomisa-demands-probe-into-pic-dealings/>

² OECD Guidelines on Pension Fund Governance and Pension Fund Asset Management available at <http://www.oecd.org/pensions/private-pensions/36316399.pdf> last accessed on 09 July 2018.

³ Yermo, J. (2008), 'Governance and Investment of Public Pension Reserve Funds in Selected OECD Countries' OECD Working Papers on Insurance and Private Pensions, No. 15, OECD Publishing. doi:10.1787/244270553278 available at www.oecd.org/finance/private-pensions/40194872.pdf last accessed on 09 July 2018.

⁴ OECD Guidelines on Corporate Governance of State-Owned Enterprises (2015) available at <http://www.bicg.eu/wp-content/uploads/2017/07/OECD-2015.pdf> last accessed on 09 July 2018 at 9.

⁵ ISSA Guidelines for the Investment of Social Security Funds available at <https://bajan.files.wordpress.com/2011/11/nisinvestmentdoc.pdf> last accessed on 09 July 2018.

to assist the committee's considerations in addressing corporate governance and investment management issues within the PIC.

9. We commend the committee for seeking to amend the Public Investment Corporation Act, 2004, ("the Act") in order to promote transparency and good governance within the PIC, however we do have concerns which relate to the appointment and functioning of the board as well as other related issues. These submissions appear below.

Clause 3 (1) – (2): Appointment of PIC Board Members

10. Corporate governance in any entity, including state owned entities, is dependent on whether or not boards have the capacity, knowledge, experience, expertise and integrity to make and carry out decisions in the interests of the shareholder, company and stakeholders, including the South African public. Poor leadership and a lack of corporate governance exercised by board members of various SOEs has had a detrimental effect not only on the affected SOEs, but also on the South African economy as whole, it is accordingly important that individuals appointed to sit on the boards of SOEs are individuals with high ethical values and integrity. This is further affirmed by the King IV Report on Corporate Governance and the PFMA.
11. Section 50 of the PFMA sets out the fiduciary duties of accounting authorities which deal with conflicts of interests and ensuring that decisions are free from influence and taken without bias. The board is the custodian of corporate governance and subject to fiduciary duties, which requires the board to guard against acting as a rubberstamps in the decision making process. Where board members breach these fiduciary duties it is vital they are held accountable for such breaches. The lack of accountability, from management and board level, in SOEs has culminated in events described in various media reports and it is important bearing in mind the beneficiaries of PIC investments that individuals who breach these duties are held accountable.
12. Furthermore, the evaluation of the performance of executive management is a function, which cannot be overstated, as they are in charge of the daily operation and management of SOEs. The board members who are appointed must be individuals who take this function and their fiduciary duties in a serious light.

13. *We welcome the introduction of requirements for board members to include representatives of the Department, major depositors and trade unions but propose that these changes should also include the requirement for a transparent nomination, selection and vetting process, which civil society and the wider public should form a part of, to ensure that individuals of integrity and requisite skill and expertise are appointed.* In this regard, the Guidelines on Governance and Investment of Public Pension Reserve Funds in Selected OECD Countries, provide that board members must be appointed following a transparent selection and nomination process.
14. *The Minister should not be required to only consult with Cabinet but should be required to make appointments based on the recommendations of the National Assembly following a transparent nomination, selection and interview process,* not unlike the one followed for the appointment of the Public Protector and other members of key chapter 9 institutions, obviously adapted in accordance with the requirements of the Act.
15. *The clause dealing with the appointment of board members should also include the requirement for ongoing due diligence in respect of board membership.* Although the PFMA sets out in sections 83 and 86 offences and penalties relating to financial misconduct, these provisions should be referred to in the section dealing with board governance so as to reiterate the fiduciary duties of the Board as well as the offences and penalties which result from a breach of such duties. We submit further that an industry specific code of conduct and conflict of interest policy must be developed and enforced to ensure that board members adhere to requirements around integrity and conflicts of interest.
16. In the same vein, although section 56 of the PFMA allows for delegations of authority to officials in public entities, such delegations should be closely regulated and the Board should be made acutely aware, through additional provisions in this section, that delegations do not divest the Board of the responsibility concerning the exercise of delegated power. In the context of the PIC, delegations are made to officials and in some instances to committees and sub-committees of the Board.⁶ *We submit that there should be much closer regulation of the delegations of*

⁶ According to paragraph 9 of a PIC press release on the VBS Bank investment, the “a revolving credit facility amounting to R350 million for VBS was approved in 2015 by the Priority Sector, Small and Medium Enterprise Fund Investment Panel, a sub-committee of the PIC’s Investment Committee” See <http://www.pic.gov.za/wp->

authority, whether to officials or to committees or sub-committees and suggest that a provision be included to deal with proper and on-going oversight in respect of decisions taken by officials, committees and sub-committees even if they don't involve significant transactions. We suggest that random testing and spot checking would assist to detect any malfeasance or conflicts of interest in this regard.

Clause 3

17. Clause 3 amends section 6 which deals with directives issued by the Minister in respect of the management of the corporation and importantly, introduces requirements for a public consultation process in respect of such directives. This is a welcome development. We note that section 10(2) of the Act, the Board must adopt an investment strategy with guidelines to regulate the investment of deposits and other money referred to in section 11 of the Act. *We submit that given the controversy surrounding investment decisions as well as alleged conflicts of interests and undue influence in investment decisions, that the investment strategy and guidelines be developed in consultation with depositors and where possible, be subject to broader public consultation. In this regard, the PIC's Corporate Governance Policy should urgently be amended, following a public consultation process.*

General comments

18. We note further that the ISSA Guidelines for the Investment of Social Security Funds provides that social security funds should not become a means for Government to finance deficits and debt. This is a particularly pertinent issue, when one considers the outcry from the Public Servants Association ("PSA") after the PIC provided Eskom with R5bn in financing, which consists mostly of government employees' pension funds. This is particularly alarming, in light of the credit rating downgrades by various global rating agencies. The main concern raised by PSA is that the transaction contradicts previous assurances from the GEPPF that pension fund money will not be used to finance struggling SOEs.

19. The ISSA Guidelines provide further that the investment in certain categories of investments should be limited or prohibited, such as loans without appropriate guarantees or on terms, which would not be acceptable to the market, unquoted shares, and investments, which raise major risks of conflict of interest. The ISSA Guidelines provide that such individually placed and unquoted investments should be subject to particularly stringent disclosure requirements and approval mechanisms, with a requirement to demonstrate that the terms of the investment are fair and not subject to improper influence or control. Provisions relating to stringent disclosure requirements and conflicts of interest should either be included in the Bill or be required in regulation and/or policy.
20. Finally, we submit that regulations should be tabled as soon as possible to ensure that the amendments are considered and scrutinised as soon as possible and with due regard for the practical and operational matters which enable the effective enforcement of these proposed amendments

Conclusion

21. We appreciate the opportunity to make comments on the Bill and hope that they will be useful in the deliberation of these amendments. We confirm that we will be available to participate in any oral hearings on the Bill.

**Submitted by Corruption Watch
Leanne Govindsamy and Michelle Sithole
15 July 2018**