TLR M Bill 01

SACCI

SACCI COMMENTS ON TRANSPORT LAWS AND RELATED MATTERS AMENDMENT BILL

1. 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 Amendment Bill is primarily aimed at introducing a legislative regime to enforce electronic toll collection on Gauteng highways recently upgraded by the South African National Roads Agency (SANRAL). SANRAL is an independent, statutory company registered in terms of the Companies Act. The South African government, represented by the Minister of Transport, is the sole shareholder and owner of SANRAL.

SANRAL planned that the roads will be tolled by means of electronic and automated methods in order to eliminate the need to queue at toll plazas. This automated non-stop method of collecting toll is referred to as e-toll. The revenue collection model was therefore based on the 'user-pay' principle.

The implementation of toll fees will have an effect on economic growth and job creation and there have been numerous complaints from civil society and SACCI on the procedure adopted to set the toll rates.

SACCI appreciates the opportunity to comment on the Amendment Bill and trusts that our comments will lead to a fairer and more equitable introduction of the user-pay principle.

2. Memorandum on the Objects of the Transport Laws and Related Matters Amendment Bill, 2012

In principle SACCI supports the need for the South African Roads Agency Limited ("SANRAL") and the South African National Roads Act, 1998 to manage and control the Republic's national road system and to take charge of the development, maintenance and rehabilitation of national roads within the framework of government policy. SACCI also supports, in principle, the utilisation of "intelligent" transport systems which, theoretically, should reduce transit times by avoiding queues at toll plazas, which often occurs as typically, not all toll gates are open at plazas. Therefore, SACCI is not opposed to electronic toll collecting systems.

SACCI is however puzzled as to why the Cross-Border Transport Agency should be tasked with the collection of tolls on behalf of SANRAL given that the objective of the Cross Border Transport Act, No 4 of 1998 is to provide for co-operative and co-ordinated provision of advice, regulation, facilitation and law enforcement in respect of cross-border road transport by the public and private sectors. This constitutes a dramatic departure from and is not aligned to the core operations of the Cross-Border Transport Agency. SACCI does not believe that this agency should be given these powers. SACCI questions why an organisation such as Tolcon which provides comprehensive management and operations services on most major toll routes, including operational analysis, optimisation of manning levels and general administration and financial services as well as collection and supervision of tolls at toll plazas and related functions such as the control and management of traffic through toll collection should not be appointed as agents.

SACCI recognises the need for the Gauteng Freeway Improvement Project to be appropriately financed and that failure to do so would have serious implications for SANRAL and national government which provided guarantees in the form of bonds. However, SACCI is concerned that with promulgation of these amendments, there will be no reprieve from the exceedingly high tariffs that are proposed.

In order to circumvent a repetition of the GFIP debacle, SACCI has analysed the project and has commented on principles that should be applied to future toll road and other infrastructure projects. This analysis is attached as Annexure 1.

3. Clause 1: Amendment of section 4 of Act 4 of 1998 SACCI recognises that section 28(1)(a) of South African Roads Agency Limited and the National Roads Act of 1998 makes provision for the South African Roads Agency to into an agreement with any person in terms of which that person to *(a)* to operate, manage, control and maintain a national road or portion thereof which is a toll road or to operate, manage and control a toll plaza at any toll road. SACCI questions why the Cross-Border Road Transport Agency may collect tolls on behalf of SANRAL. The Cross-Border Transport Agency has no brief to operate a toll road, nor to collect tolls. This activity is not core to its operation which is to provide for co-operative and co-ordinated provision of advice, regulation, facilitation and law enforcement in respect of cross-border road transport by the public and private sector. The Agency, in fact has no brief or connection with toll roads, which are purley domestic in nature. SACCI questions if this infers that it is intended that in future the Cross-Border Transport Agency will become the universal toll collection agency, effectively eliminating private sector participation.

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4. **Clause 4: Amendment of section 58 of Act 7 of 1998**

While the requirement for regulations pertaining to the administration of the Electronic Tolling System is not disputed, the need for public comment on the regulations is important as it may prescribe practical issues like the time and manner in which toll fees may be paid etc. This could have far reaching practical consequences and could introduce significant costs to business or public entities if, for example, there is no alignment between the proposed regulations and the practical payment systems utilised by the entities liable for payment. SACCI therefore supports the provision that a comment period of at least 4 weeks from date of publication of the notice is provided for.

5. **Clause 6: Amendment of section 60 of Act 7 of 1998** SACCI agrees that the provisions of the National Credit Act should not be applicable to tolls, as this could arguably be seen as a utility charge.

ANNEXURE 1

AN ANALYSIS BY THE SOUTH AFRICAN CHAMBER OF COMMERCE AND INDUSTRY (SACCI) ON THE GAUTENG FREEWAY IMPROVEMENT PROJECT (GFIP)

1. Introduction

The analysis of the Gauteng Freeway Improvement Project (GFIP) that was undertaken by the South African Chamber of Commerce and Industry (SACCI) and was presented to its members at its Annual convention that took place on 04 and 05 October 2012. The members unanimously adopted the recommendations made in the analysis which is presented here for information and consideration.

2. **Background**

SANRAL recently embarked on the Gauteng Freeway Improvement Project (GFIP) to improve and upgrade the national roads (N1, N3, N12 and R21) in and around the metropolitan areas of Tshwane, Johannesburg and Ekurhuleni in the Gauteng Province. The GIPF cost an estimated R20 billion.

The introduction of the user pay principle on highways that were traditionally free to use aroused public anger against the tolls. In addition, many of the highways had been built decades ago and no credible transport alternatives are available. The public outrage also led to general uncertainty over the date of introduction and actual cost of using the highway. For example, SANRAL introduced high penalties to be charged to so-called occasional users who would pay six times the amount of road users with registered e-tags. Due to this uncertainty, many road users simply did not purchase the electronic device (e-tag) necessary to deduct toll charges.

In reaction to the possibility that the large amount of non-paying road users would render the revenue model unsustainable, the Department of Transport (DOT) released draft regulations on the policing of the e-toll system. The regulations would primarily serve to introduce a non-state "police force" on Gauteng highways to ensure that road users paid their e-toll fees. The non-state police force would be given powers to stop and search vehicles and confiscate private property. The CEO of SANRAL was given the power to appoint individuals to positions with powers similar to police officers. SACCI raised the issue as a concern at the time because such a police force without the conventional checks and balances would be unconstitutional and detrimental to safety and security.

Following a court application by road users opposed to the e-tolling (Opposition to Urban Tolling Alliance, or OUTA and others), SANRAL was forced to delay the implementation of the tolling system and SANRAL allowed holders of the electronic devices with credit charged on it to close the e-toll Account and return the e-tag. This created the problem of servicing the R20 billion debt that SANRAL had incurred. The National Treasury provided R5.8 billion to SANRAL in 2012 and also guaranteed 57% of the R20 billion debt through interest-bearing bonds. The possibility is that the remaining debt would have to be serviced by National budgetary allotment, which implies that the repayment of the debt will be financed from general tax revenue.

In May 2012 Moody's, an international credit rating agency downgraded the credit rating of SANRAL and held the ratings outlook at negative. According to the agency, the current rating is supported by SANRAL's public legal status, close financial and operational linkages with the South African government and its good historical financial management. Credit challenges that remain are high debt levels of SANRAL, uncertainty over the e-tolling, large debt exposure that is partially guaranteed by government and spending pressure in the form of maintenance of existing infrastructure. Moody's suggests that SANRAL would get a more favourable rating if

South Africa's government bond rating stabilised and SANRAL could find a resolution to the debt arising from the GFIP.

SANRAL has indicated that tolling will commence given the recent favourable Constitutional court judgement.

This amendment bill has been necessitated by the development of the GFIP, as well as future plans for the development of road infrastructure if the user pays principle is to be used. Apart from the physical infrastructure, the GFIP will result in the operation of a road network that involves the utilisation of "intelligent" transport systems. An important component of the network is the electronic toll collection ("ETC") system. The Bill is required to enable the appropriate implementation of the ETC system as the SANRAL Act was promulgated; the ETC was not envisaged in its current form. The SANRAL Act is not broad enough to cater for some aspects of the ETC i.e. the Bill will facilitate the collection of tolls and the implementation of the ETC system.

General Comments

SACCI compiled a list of international best practice principles that is applicable to Infrastructure financing. These principles serve to guide the implementation as well as the involvement of stakeholders to generate the best net effect. The GFIP fell short on a number of these principles and while the commencement of tolling is imminent, cognisance must be taken to prevent similar mistakes from happening in future.

Application of principles to GFIP

1. *Principle: The tariff schedule for an infrastructure network should be finalised prior to implementation (and possibly before construction of the network), and should be based on the user-pay principle. This principle is qualified by the need to ensure that the tariff is cost-reflective and includes financing, construction, operation and maintenance costs and should have an explicit formula linking the tariff setting to the total cost over time. The collection of the tariff can be done in various ways, ranging from on-sight direct collection to a national fuel levy that implicitly promotes the user-pay principle.*

GFIP facts

- The tariff schedule was not finalised or published prior to construction and there was a large degree of uncertainty over the tariff regime up until the intended implementation.
- The tariff was supposed to be based on the user-pay principle, but information emerged that the cost of administering the fees would be R6 billion, which is very high in relation to the R20 billion cost of constructing the network.
- The concern over the GFIP tariffs is that there is no guarantee against a rapid escalation once the legal and political hurdles have been cleared to its implementation. There is also a very real danger that the tariffs generated by the GFIP will cross-subsidise similar toll-roads across the country administered by SANRAL, because SANRAL will be loath to introduce any further inner-city open tolling roads because of the public reaction to the GFIP.

SACCI Proposals:

The GFIP fails this principle primarily because of the general lack of transparency and accountability. The R6 billion cost of administering the system was not made public by SANRAL and the risk of a rapid escalation in tariffs has not been dealt with.

SACCI proposes that:

- A formal tariff escalation formula linked to an index of costs is made mandatory for any tolled road.
- The main costs of any toll fee should be made public during the stakeholder consultation phase.

2. *Principle: Service/quality differentiation of an infrastructure project and the provision of viable alternatives allows for better welfare optimisation and consumer choice while adhering partly to the cost-recovery principle. It must make economic sense to use tolled road, as the benefits in time saved and convenience is higher than the cost.*
3. *Principle: The quality differentiation of an infrastructure network can be done on a number of variables to further strengthen consumer welfare and choice. An infrastructure network can be regulated or a service-level agreement can be created which could include penalties for non-compliance which can ensure the quality of the service.*
4. *Principle: If the costs of the project are covered by the tariff, then the occasional overflow funds can be used to fund similar projects. However, the application of user-pay and cost-reflective principles would suggest that such overflows would best be used to reduce the tariff in subsequent periods.*

GFIP facts

- The GFIP intended to offer differing tariffs according to vehicle type, distance travelled, time of day travelled and existence of pre-paid e-toll account in vehicle.
- The GFIP effectively covers the most important roads in Gauteng that were in heavy use before the GFIP. Although there are secondary roads that can be used, they are not highways and there is a distinct danger of heavy traffic congestion and significant wear and tear on roads not intended for high levels of traffic with consequential increased maintenance costs on these roads.
- There are no penalties available or published grievance procedures that can be levelled against SANRAL for poor service
- Any overflow of funds of the GFIP will go directly to SANRAL to presumably cross-subsidise other toll roads, as there is no mention of how an overflow will be dealt with

SACCI comment

The GFIP fails on above mentioned principles. The public outrage to the tolling of the GFIP was in large due to the fact that the highways were essential transport routes for a large portion of the Gauteng population long before any of the upgrades brought about by the GFIP. This is compounded by the public perception that there are no alternatives, which implies that the public is forced into yet another administrative cost, and that although there have been physical improvements brought to the roads, many of the highways still face heavy congestion on a daily basis. In short, there is insufficient proof to the public that the new tariffs will equate to a better service.

SACCI proposes that:

- SANRAL in cooperation with government should improve the non-tolled alternatives to be better able to handle the increase in traffic in order to show their commitment to providing a quality service of choice rather than forcing a payment of tariffs.
- Road users should receive compensation or credit to their account whenever there are traffic delays on tolled highway in order to ensure quality service provision.

5. *Principle: Public support for an infrastructure project is not essential, but leads to a reduction and delay in the implementation of tariffs and ultimately in a delay in infrastructure development. Public support can be won through ensuring transparency of the process and in the application of reasonable tariffs. The benefits of the infrastructure project should be made clear to the public as a means to win public support*

GFIP facts

- The GFIP carried no public support and in fact the outrage to the tariffs spurred the creation of one non-profit organisation with enough funding to successfully launch an application to a High Court and the Constitutional Court. The opposition to the GFIP also spurred a nation-wide protest against the introduction of the tariffs.

- The public opposition to the tariffs also led to the Department of Transport proposing a possibly unconstitutional security force with powers to stop, search and confiscate vehicles. This force would fall under the control of the SANRAL CEO to enforce payment of the GFIP tariffs.

SACCI comment

The GFIP fails this principle due to the lack of transparency of the GFIP, a lack of proper stakeholder engagement, a lack of communication and a lack of incentives (like reduced rates for the wholesale purchase of e-toll credits) to comply. The facts present sufficient proof that there was overwhelming public opposition to the GFIP tariffs. Although the fundamentals of the tariff design (e.g. lack of transparency, alternatives, quality differentiation etc.) have much to do with the public opposition, the public perception was that SANRAL embarked on a course of action without engaging with the public. This perception has been a powerful force against the GFIP tariffs and shows that the so-called "soft issues" of building a positive public cannot be ignored.

SACCI proposes that:

- SANRAL implement and publish a schedule of its stakeholder engagements on the introduction of a new toll road.

- SANRAL must explicitly state the benefits to any new toll road, namely: the cost of the use of the toll road should provide the user with a financial and economic benefit that is greater than the cost of using an alternative route.

6. *Principle: The private sector can participate in the construction side of infrastructure projects (as opposed to administration of an existing network) by means of a project finance approach that shares the risk between the private partner and government.*
7. *Principle: Government must commit to providing substantial control over the infrastructure network to the private partner in a Public Private Partnership in order to improve the credit worthiness of the project and thereby reduce the cost of borrowing.*
8. *Principle: The degree of control and other rights of a private partner to a PPP can be tailored initially and over time to share project risks optimally. The rights of the private partner to a PPP should be entrenched to ensure that the risk of political interference does not unnecessarily increase the cost of capital.*

GFIP facts

- SANRAL took the entire risk of the GFIP, but a significant amount of its debt is explicitly guaranteed by government. The fact that SANRAL is a government agency also implies that its debts will be paid by government in the case of default.

- Although private construction companies were contracted for the GFIP, the ownership of the GFIP rests solely in SANRAL, and by extension, government.

- The public ownership of SANRAL exposed the GFIP to some political pressure to delay the implementation of the tariffs.

SACCI comment

The GFIP fails principle 6 because there was no risk sharing with private partners. The GFIP fails the second principle because although SANRAL is meant to operate as an independent agency, government nonetheless interfered with the tariff because of political pressure. The GFIP fails principle 8 because the rights of the "private partner" (i.e. SANRAL) was not so much tailored as dictated by government (i.e. delays in implementing the tariffs) and because there was no attempt to entrench the rights of SANRAL.

The blame for the failures of principles 8,9,10 and 11 can be shared equally between SANRAL and the national government. The interference by government was also not completely negative as the interference initially delayed the implementation of high toll fess which was beneficial to the road users, but government has since reversed on its position. The fundamental problem with the GFIP was the incestuous relationship between SANRAL and government and the fact that SANRAL is expected to operate like a private company but not given the independence to do so. Of course, SANRAL could've enlisted the help of a private partner in the GFIP but ostensibly chose not to.

SACCI proposes that:

- Private partners to an infrastructure project become a default position to be tendered for by interested parties, based on an appropriate PPP model.

- The conditions of the remuneration to the private parties must be made public during the tender process and guaranteed by government and SANRAL.

- Any changes to the contract between private partner and government or SANRAL can be included in the agreement, but should also be made public.

9. *Principle: Government can structure debt instruments for infrastructure projects in various ways with the State Bank and toll-revenue bonds model being two possibilities. Such a pooling of risk allows for more efficient marketing of debt to international investors.*
10. *Principle: The advantage to government of an off-balance sheet financing of infrastructure development by way of a project finance model can be compensated by a direct government guarantee or undertaking to buy a portion of the debt in tradable security form. The guarantee also reduces the cost of capital since the credit rating of the debt is linked to the guarantor (i.e. government)*

GFIP facts

- A fair amount of the debt used to fund the GFIP was guaranteed by national government.

- SANRAL also issues its own debt that is implicitly guaranteed by government.

SACCI comment

The GFIP satisfies principle 9 because SANRAL pools its countrywide risk when issuing debt instruments. The GFIP satisfies principle 10 because a large portion of the off-balance sheet debt was indeed guaranteed, although principle 10 is more applicable to a private partner than to a government agency which enjoys an implied debt guarantee.

SACCI proposes that:

- Government should provide an option to guarantee the debt of a private partner as a condition during the tender process.
- Government should pool the guaranteed debt of the private partners into a single fund in order to market the debt more efficiently internationally.

11. *Principle: Government can improve its credit rating and thereby reduce the cost of capital of guaranteed debt for infrastructure financing by prioritising improvement on the following macro-economic variables: per capita income, GDP growth, inflation, external debt, level of economic development, and default history. Although there is an obvious trade-off between the priorities, the fundamental principle is that macro-economic policy should be slanted toward fiscal and monetary restraint*
12. *Principle: Government should prioritize infrastructure development on projects that are not already captured by annual fiscal expenditure. This implies that expansion of the support network for heavy industry and commercial activity should receive priority treatment.*
13. *Principle: Projects which would deliver greater economic growth through support of heavy industry and commercial activity should be prioritized in order to generate a larger cash flow from tax revenues as soon as possible.*
14. *Principle: The principle of voluntary association (as opposed to mandated contributions from pension funds to infrastructure SPVs for example) should be guarded in order to assure fiscal discipline and efficiency from private engagement.*
15. *Principle: South Africa is capable, in the current environment, of drawing funds from overseas. However, it is important that South Africa's attractiveness as an investment destination is relative to other destinations and could diminish if the debt to GDP ratio becomes too high. This implies that fiscal discipline is an important factor in infrastructure development.*
16. *Principle: South Africa is relatively safe in terms of export markets for its major export products over the short- to medium term. However, the cost of the infrastructure projects aimed at supporting export industries like coal (e.g. SIP 1), should take into account the worst case scenario for commodity prices and attempt to structure infrastructure around supporting export products with different economic cycle profiles (e.g. coal and agricultural exports).*

GFIP facts

- The GFIP is a fundamental infrastructure project that should, all else being equal, reduce the cost of doing business, and by extension reduce inflation and improve GDP growth.
- The GFIP was at its core an upgrading and maintenance exercise of decades-old infrastructure.

SACCI comments

The GFIP satisfies principle 11, 13 and 16 because the GFIP is by its nature intended to support balanced economic growth and does not clash with the principle of fiscal restraint (i.e. the project is a necessary budgetary expense in general). However, the GFIP fails principle 12 because it is in large part a duplication of the government mandate to provide and maintain roads. The GFIP satisfies principle 16 because the roadways are used for industrial and commercial purposes.

Fiscal discipline and prioritisation of infrastructure projects are clearly necessities that need to be met in order to engage with a sustainable infrastructure expansion plan. The affordability of any infrastructure project depends on the funds available within the private sector, whether the network is financed by government or private funds. The implication is that the current expenses, like taxes, of the private sector must be taken into account to ensure that the private sector can indeed afford an additional administered charge that is not covered by the government budget.

SACCI proposes that:

- The principle fiscal restraint and fiscal neutrality should be met any infrastructure project.
- The GFIP and any new infrastructure projects must clearly identify the benefits to industry and commerce as part of the project specific Economic Impact Assessment.

Conclusion:

The failure by SANRAL to adhere to the principles outlined above is worrying but not necessarily a dead end for the GFIP. It is important to note that policy design is an on-going process and that the quality of the policy depends on the level of transparency and commitment to integrating stakeholder inputs.