
Carry Over Report: for consideration by new Portfolio Committee

DEPARTMENT OF MINERALS AND ENERGY

Documents submitted to the Parliamentary Portfolio Committee (Minerals and Energy) on the Nuclear Energy Bill (B10-99) and the National Nuclear Regulator Bill (B 11-99) on 10 March 1999 following the Resolution to retain the Bills for consideration by the new Portfolio Committee.

1. Amendments proposed by the State Law Advisers based on the documents below, as well as discussions at the Portfolio Committee.
2. DME Report to the PPC on issues raised during the Public Hearings
 - National Nuclear Regulator Issues (paragraphs 1 - 53) Nuclear Energy Bill Issues (paragraphs 1 - 9)
3. DME Final outstanding issues regarding the National Nuclear Regulator Bill for Portfolio Committee meeting on 3 March 1999 (paragraphs 1-16).

10 MARCH 1999

PORTFOLIO COMMITTEE ON MINERALS AND ENERGY

PROPOSED AMENDMENTS TO NATIONAL NUCLEAR REGULATOR BILL

[B 11-99]

(Prepared by the State Law Advisers pursuant to the Committee's meetings during the February/March 1999 Parliamentary session)

* *Amendments made after the Committee's meetings on 3 March 1999 are indicated by # on the left of the pages and comments and explanations are in italics.*

GENERAL EXPLANATION AS TO THE MEANING OF "in consultation with", "after consultation with" ("after consulting") and "on the recommendation of":

*(a) If a functionary is required to act "in consultation with" another functionary, the two functionaries in question must reach consensus - the one may **only** act with concurrence of the other functionary.*

*(b) If a functionary is required to act "after consultation with" another functionary, the first-mentioned functionary may only act after consulting and considering the views of the other functionary, but they not need reach consensus. In other words the first-mentioned functionary may act **without** the concurrence of the other functionary.*

*If a functionary is required to act on the recommendation of another functionary, the last-mentioned functionary must make a recommendation to the first-mentioned functionary. The first-mentioned functionary may accept or reject the recommendation. If the recommendation is rejected the last-mentioned functionary must make a new recommendation. The first-mentioned functionary may **not** act on*

his or her own.

CLAUSE 1

1. On page 6, after line 15, to insert:

(ix) "human activity" means any activity involving the possession, storage or disposal of radioactive material or any activity performed by an individual or mechanical operation initiated by an individual;

2. On page 6, in line 27, to omit "established in terms of" and to substitute "contemplated in".

3. On page 6, in line 55, after "nuclear" to insert "spent fuel".

CLAUSE 2

The addition of a paragraph to subclause (1) was proposed (i.e. "(d) the regulation of radioactive waste"), but since it is already covered by the existing paragraph (a), this amendment was deleted.

1. On page 10, in line 3, to omit "the values listed in the Schedule" and to substitute:

the safety standards contemplated in section 32

2. On page 10, in lines 9 and 10, to omit paragraph (e).

3. On page 10, from line 11, to omit paragraph (f).

CLAUSE 5

1. On page 10, in line 32, after "damage" to insert:
without unduly limiting the beneficial practices giving rise to radiation exposure,

NEW CLAUSE

1. That the following be a new Clause to follow Clause 5:

Co-operative governance

6.(1) All organs of state, as defined in section 239 of the Constitution of the Republic of South Africa, 1996 (Act No.108 of 1996), with responsibility for the monitoring and control of radioactive material or exposure to ionising radiation must cooperate with one another in order to-

- (a) ensure the effective monitoring and control of the nuclear hazard;
- (b) co-ordinate their functions and activities;
- (c) minimise the duplication of procedures and functions;
- (d) promote consistency in the exercise of their functions;
- (e) give effect to the principle of co-operative government in Chapter 3 of the Constitution.

(2) The Regulator must establish in consultation with the relevant organ of state mechanisms and procedures to give effect to the co-operation referred to in subsection (1).

CLAUSE 6

1. On page 12, in line 2, after "acquire" to insert "any".
2. On page 12, in line 2, after "property" to insert "and proprietary right".
3. On page 12, in line 34, after sites" to insert "including, but not limited to, the prescribed contents".
4. On page 12, after line 34, to insert:

(2) The Minister must table in Parliament the annual public report submitted to him or her in terms of subsection (1)U) within 14 days after it is so submitted if Parliament is then in ordinary session or, if Parliament is not then in ordinary session, within 14 days after the commencement of its next ordinary session.

CLAUSE 7

1. On page 12, from line 46, to omit subclauses (4) and (5) and to substitute:

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(4) The board consists of-

- (a) the chairperson appointed by the Minister;
- (b) the deputy chairperson appointed by the Minister;
- (c) not more than five other directors appointed by the Minister;
- (d) one representative of organised labour appointed by the Minister;

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(e) an official from the Department of Minerals and Energy, appointed by the Minister; and

(f) the chief executive officer, who may not be appointed as chairperson or deputy chairperson.

(5) The Minister may from time to time co-opt to the board one or more persons representing communities which may be affected by nuclear activities.

(6) A co-opted member of the board contemplated in subsection (5) does not have any voting rights.

ALTERNATIVE FOR SUBCLAUSE (5) and omit subclause (1)(d):

"(5) The Minister may from time to time co-opt to the board-

- (a) an equal number of persons representing organised labour and organised business, respectively, nominated by NEDLAC; and
- (b) one or more persons representing communities which may be affected by nuclear activities."

This subclause inter alia provide for the co-option of organised labour and organised business representatives (without voting rights) to the board. This proposal is made since we are of the view that it-

- (a) will eliminate any doubt as to the possible impingement on the independence

of the Regulator as required by the Conventions of Nuclear Safety; and

(b) is more equitable in that it allows representation of both organised labour and business.

ALTERNATIVE(2) FOR SUBCLAUSES (5) AND (6):

To provide in subclause (4) that both organised labour and organised business have one director on the board. In our view this will not infringe upon the independence of the Regulator in a manner which is contrary to the Convention of Nuclear Safety since these two directors will be a minority in relation to the four other directors plus not more than five other directors.

ALTERNATIVE (3) FOR SUBCLAUSES (5) AND (6):

Not to provide for any labour and business representatives on the board, whether as directors or as co-opted members.

(7) A person may only be appointed as a director in terms of subsection (4)(a), (b), (c) or (d) if he or she is suitably qualified.

(8) For the purposes of appointing the directors of the board referred to in subsection (4)(a) to (d)-

(a) the Minister must through the media and by notice in the *Gazette* invite nominations of persons as candidates for the relevant positions on the board;

(b) a panel, appointed by the Minister, must compile a shortlist of not more than 20 candidates from the persons so nominated; and

(c) the relevant committees of the National Assembly and the National Council of Provinces must recommend to the Minister from the shortlist so compiled, the persons to be appointed to the relevant positions on the board.

(9) A person is disqualified from being appointed or remaining a director if he or she is-

(a) not a South African citizen;

(b) declared insolvent;

(c) convicted of an offence and sentenced to imprisonment without the option of a fine;

(d) nominated as a candidate for election as a member of Parliament or any provincial legislature in terms of the Electoral Act, 1998 (Act No.73 of 1998);

(e) designated or appointed to any other public office in the State; or

(f) a holder of a nuclear authorisation or an employee of such holder.

The words "other than the director referred to in subsection (1)(d)" were omitted since if it is provided that a labour representative is a director of the Board, the Convention on Nuclear Safety would, in our view, require that such representative may not be an employee of a holder of nuclear authorisation.

(10) A director or co-opted member of the board may not be present during, or take part in, the discussion of, or the making of a decision on, any matter before the board in which that director or co-opted member or his or her spouse, life partner, minor child, business partner or associate or employer, other than the State has a direct or indirect financial interest.

(11) Upon appointment of a person as-

(a) a director of the board; or

(b) a co-opted member to the board;

he or she must submit to the Minister and the board a written statement in which he or she declares whether or not he or she has any interest contemplated in subsection (10).

(c) If any director or co-opted member acquires or contemplates acquiring an interest which could possibly be an interest contemplated in subsection (10), he or she must immediately in writing declare that fact to the Minister and the board.

2. On page 14, in line 15, to omit subsection (8).

CLAUSE 8

1. On page 14, in line 30, to omit "member" and to substitute "director".
2. On page 14, in line 31, to omit "member" and to substitute "director".

CLAUSE 13

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1. On page 20, in lines 18 and 19, to omit ", provident or medical aid scheme or fund for the benefit for its" and to substitute:
or provident fund or medical scheme for the benefit of the Regulator's".

Clause 13(5); This provision now (as amended above) inter alia empowers the board to establish, manage and administer any pension, provident fund or medical scheme for the Regulator's employees: Any such pension fund, provident fund and medical scheme will be subject to the provisions of the Pension Funds Act, 1956 (Act No.24 of 1956), the Associated Institutions Pensions Fund Act, 1963 (Act No. 41 of 1963), and the Medical Schemes Act, 1998 (Act No.131 of 1998), respectively.

2. On page 20, after line 20, to insert:

(6) Any pension or provident fund established by the Council for Nuclear Safety in terms of section 13(4)(b) of the previous Act is deemed to be a fund established in terms of subsection (5).

CLAUSE 18

1. On page 22, from line 26, to omit paragraphs (a) and (b) and to substitute:

(a) serve a copy of the application upon-

(i) every local authority affected by the application; and

(ii) such other body or person as the chief executive officer determines; and

(b) publish a copy of the application in the *Gazette* and a newspaper circulating in the area of every such local authority.

CLAUSE 19

1. On page 24, in line 3, to omit", as the case may be".

CLAUSE 23

1. On page 24, in line 53, after "officer" to insert:

to ensure public access to the conditions specified in the authorisation

2. On page 26, after line 4, to insert:

(4) The holder of a nuclear installation licence must establish a public safety information forum as prescribed in order to inform the public living in the vicinity of the nuclear site in question on nuclear safety and radiation safety matters.

CLAUSE 25

1. On page 26, in lines 30 and 31, to omit paragraphs (c) and (d).

CLAUSE 26

1. On page 26, in line 38, to omit "after ~ and to substitute "on the recommendation of".

2. On page 26, in line 47, after "her" to insert "categorisation and".

3. On page 28, in lines 13 and 14, to omit "an amount as contemplated in section 27(2)" and to substitute:

to an amount determined by the Minister, after consulting the board and by notice in the *Gazette*

CLAUSE 27

1. On page 28, in line 17, after "is" to insert "despite any other law".

2. On page 28, from line 27, to omit subsection (2).

3. On page 28, in line 35, after "1973" to insert "(Act No.15 of 1973), where such a material is a Group IV hazardous substance as defined in section 1 of that Act".

4. On page 28, in line 43, to omit "that person's entitlement to a benefit in terms of this Act shall lapse" and to substitute:

the amount of compensation payable by the relevant holder of a nuclear installation licence to that person must be determined in terms of that Act

5. On page 30, in line 2, after "certificate" to insert:
during his or her period of responsibility

6. On page 30, in line 6, to omit "that" and to substitute "such unauthorised".

7. On page 30, in line 8, to omit "radioactivity" and to substitute "radioactive material".

CLAUSE 31

1. On page 32, from line 34, to omit subclause (2).

CLAUSE 32

Clause rejected.

NEW CLAUSE

1. That the following be a new Clause to follow Clause 31:

Safety standards and regulatory practices

32. The Minister must, on the recommendation of the board, make regulations in terms of section 43 regarding safety standards and regulatory practices.

CLAUSE 34

Clause rejected.

NEW CLAUSE

1. That the following be a new Clause to follow Clause 34:

Emergency planning

34.(1) Where the possibility exists that a nuclear accident affecting the public may occur, the Regulator must direct the relevant holder of a nuclear authorisation, other than a certificate of exemption, to-

(a) enter into an agreement with the relevant local and provincial authority to establish an emergency plan within a period determined by the Regulator;

(b) cover the costs for the establishment and management of such emergency plan; and

(c) submit such emergency plan for its approval.

(2) The Regulator must ensure that such emergency plan makes adequate provision for the protection of persons against the effect of a nuclear accident.

(3) When a nuclear accident occurs, the holder of a nuclear authorisation, other than a certificate of exemption, in question must implement the emergency plan as approved by the Regulator.

(4) The Minister may, on recommendation of the board, impose limitations on the development surrounding any nuclear installation to ensure the effective implementation of any applicable emergency plan.

CLAUSE 36

1. On page 36, from line 27, to omit paragraph (b) and to substitute:

(b) on the request of any person, make that record available to that person.

CLAUSE 38

1. On page 38, from line 45, to omit subsection (3).

CLAUSE 41

1. On page 40, in line 28, before "within" insert "be lodged".

NEW CLAUSE

1. That the following be a new Clause, to follow clause 41:

Appeal to High Court against Minister's decision

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42.(1) Any person adversely affected by a decision of the Minister, either in terms of section 41(3) or in the exercise of any power in terms of this Act, may appeal against that decision to the High Court.

(2) Such appeal must-

(a) be lodged within 60 days from the date on which decision was made known by the Minister or such later date as the High Court permits; and

(b) set out the grounds for the appeal.

(3) The appeal must be proceeded with as if it were an appeal from a Magistrate's Court to a High Court.

CLAUSE 42

1. On page 40, in line 38, to omit "The" and to substitute "Subject to section 32, the".

2. On page 40, after line 45, to insert:

(3) Before any regulations are made in terms of subsection (1), the Minister must-

(a) by notice in the **Gazette**, invite the public to comment on the proposed regulations; and

(b) consider that comment.

CLAUSE 43

1. On page 42, in lines 4 to 7, to omit ", who" up to and including "prescribed".

Clause 43(5): *The Committee has expressed some concern on the said clause in the sense that the Minister will be precluded from withdrawing a decision made by the Director-General (the delegatee) where the latter has made a decision where it confers a right or an entitlement on a third party.*

It should firstly be pointed out that a decision made or discretion exercised by a delegatee (in this instance the Director-General) is regarded as a lawful decision made or discretion exercised by the delegator (the Minister). Furthermore, it has been held by our courts that although the same authority which introduces something may withdraw it, it cannot thereby affect or abolish the rights which its previous act has already created. (See Brown v Leyds NO (1897) 4 OR 17, 39 and Holden V Minister of the Interior 1952 (1) SA 98 (T) 102 A-B.)

Since the right to fair administrative action is enshrined in section 33 of the Constitution, 1996, we have little doubt that the clause under discussion is sound in law and in accordance with the Constitution.

CLAUSE 44

Clause rejected.

CLAUSE 46

1. On page 42, from line 30, to omit "A" and to substitute:

Subject to any national legislation contemplated in section 32(2) of the Constitution of the Republic of South Africa, 1996 (Act No.108 of 1996), a

2. On page 42, from line 31, to omit paragraph (a) and to substitute:

(a) may not disclose to any other person or publish any information which relates to any nuclear installation or nuclear site or vessel or human activities described in section 2(1)(c) in respect of which a nuclear authorisation has been issued or is to be issued and not yet public knowledge-

(i) if the disclosure of that information is likely to jeopardise the physical security arrangements in respect of such installation, site, vessel or human activities as required by the Regulator for the protection of persons or the security of the Republic; or

(ii) if the information consists of trade secrets or other confidential financial, commercial, scientific or technical information and the disclosure thereof is likely to cause harm to the commercial or financial interests of the holder or prospective holder of the nuclear authorisation in question or any third party;

(b) not authorised thereto, may not be in possession of any documents if it is likely to jeopardise the physical security arrangements in respect of such installation, site, vessel or human activities as required by the Regulator for the protection of persons or the security of the Republic;

3. On page 42, after line 44, to insert:

(3) Despite the provisions of any other law, no person is civilly or criminally liable or may be dismissed, disciplined, prejudiced or harassed on account of having disclosed any information if-

(a) the person in good faith reasonably believed at the time of the disclosure that he or she was disclosing evidence of a health or safety risk or a failure to comply with a duty imposed by this Act; and

(b) the disclosure was made in accordance with subsection (4).

(4) Subsection (3) applies only if the person concerned-

(a) disclosed the information concerned to-(i) a committee of Parliament or a provincial legislature;

(ii) the Public Protector;

(iii) the Human Rights Commission;

(iv) the Auditor-General;

(v) the National Director of or a Director of Public Prosecutions;

(vi) the Minister;

(vii) the Regulator; or

(viii) more than one of the bodies or persons referred to in subparagraph (i) to (vii); or

(b) disclosed the information concerned to one or more news medium and on clear and convincing grounds (of which he or she bears the burden of proof) believed at the time of the disclosure-

(i) that disclosure was necessary to avert an imminent and serious threat to the safety or health of an individual or the public, to ensure that the health or safety risk or the failure to comply with a duty imposed by the Act was properly and timeously investigated or to protect himself or herself against serious or irreparable harm from reprisals; or

(ii) giving due weight to the importance of open, accountable and participatory

administration, that the public interest in disclosure of the information clearly outweighed any need for non-disclosure; or

(c) disclosed the information concerned substantially in accordance with any applicable external or internal procedure (other than the procedures contemplated in paragraph (a) or (b)); or

(d) disclosed information which, before the time of the disclosure of the information, had become available to the public, whether in the Republic or elsewhere.

SCHEDULE

Schedule rejected.

10 MARCH 1999

PORTFOLIO COMMITTEE ON MINERALS AND ENERGY PROPOSED AMENDMENTS TO NUCLEAR ENERGY BILL [B 10-99]

(Prepared by the State Law Advisers pursuant to the Committee's meetings during the February/March 1999 Parliamentary session)

* *Amendments made after the Committee's meetings on 3 March 1999 are indicated by # on the left of the pages and comments are in italics.*

CLAUSE 12

Clause rejected.

NEW CLAUSE

1. That the following be a new Clause to follow Clause 11:

Main functions of Corporation

12. The main functions of the Corporation are-

(a) to undertake and promote research and development in the field of nuclear energy and radiation sciences and technology and, subject to the Safeguards Agreement, to make these generally available;

(b) to process source material, special nuclear material and restricted material and to reprocess and enrich source material and nuclear material; and

(c) to co-operate with any person or institution in matters falling within these functions subject to the approval of the Minister.

Clause 13: *The Committee raised the question whether the Corporation's power to establish a subsidiary company in terms of clause 13(1)(a) (l) is sufficient to hive off the commercial side from the Corporation.*

The legal position is that the Corporation will always have some interest in the subsidiary company so established. The same consideration holds true even if the Corporation is given the power to establish a company. Such a subsidiary company or company will therefore not be totally antonymous.

Recommendation: *The Department has informed us that the commercial side of the Corporation is not at present a clearly definable unit which can immediately be hived*

off the Corporation and that an investigation in this regard must still be conducted. For that reason we recommend that the wording of clause 13(1)(a)(i) be retained in order to allow the Corporation to establish a subsidiary and gradually transfer the commercial enterprise of the Corporation to that subsidiary company. Once the transfer has been completed, legislation similar to the Legal Succession to the South African Transport Services Act, 1989 (Act No. 9 of 1989), in which it is provided for the establishment of a company and the transfer to it of the commercial enterprise of the State in the South African Transport Services, can be adopted to provide for the transfer from the subsidiary company to the newly established company of the commercial enterprise of the Corporation. The newly formed company will then be an antonymous going concern.

CLAUSE 24

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1. On page 26, in lines 49 and 50, to omit ", provident or medical aid scheme or fund" and to substitute:
or provident fund or medical scheme

CLAUSE 26

Clause rejected.

NEW CLAUSE

1. That the following be a new Clause to follow Clause 25:

Accounting and auditing

26. The Corporation is deemed to be a listed entity as defined in section 1 of the Reporting by Public Entities Act, 1992 (Act No.93 of 1992).

CLAUSE 27

Clause rejected.

CLAUSE 33

1. On page 34, in line 44, to omit "The" and to substitute "the".
2. On page 36, after line 18, to insert:

(e) the Minister must consult with the South African Council for the Non-Proliferation of Weapons of Mass Destruction, established by section 4 of the Non-Proliferation of Weapons of Mass Destruction Act, 1993 (Act No.87 of 1993), on any matter affecting the proliferation of weapons of mass destruction.

CLAUSE 34

1. On page 38, in line 43, after "may" to insert:
after consulting the South African Council for the Non-Proliferation of Weapons of Mass Destruction on any matter affecting the proliferation of weapons of mass destruction

CLAUSE 35

1. On page 38, in line 54, after "having" to insert:
consulted with the South African Council for the Nonproliferation of Weapons of Mass Destruction on any matter affecting the proliferation of weapons of mass destruction and

CLAUSE 54

1. On page 60, after line 13, to insert:

(4) Before any regulations are made in terms of subsection (1), the Minister must-
(a) by notice in the *Gazette*, invite the public to comment on the proposed regulations; and
(b) consider that comment.

CLAUSE 55

1. On page 60, after line 19, to insert:

(2) The Minister may assign any institutional obligation to the Corporation or any statutory or other body, which has the capacity to fulfil the Republic's responsibilities with regard thereto.
2. On page 60, in line 20, after "(1)" to insert "or (2)".
3. On page 60, in line 25, after "(1)" to insert "or (2)".

NEW CLAUSE

1. That the following be a new Clause to follow Clause 58:

Amendment of Act 87 of 1993

59. The Non-Proliferation of Weapons of Mass Destruction Act, 1993 (Act No.87 of 1993), is amended as set out in the Schedule.

NEW SCHEDULE

1. That the following be a new Schedule to follow Clause 60:

SCHEDULE

AMENDMENT OF NON-PROLIFERATION OF WEAPONS OF MASS DESTRUCTION ACT, 1993

(Section 59)

GENERAL EXPLANATORY NOTE:

[] Words in bold type in square brackets indicate omissions from the existing enactments.

_____ Words underlined with solid line indicate insertions in existing enactments.

Amendment of section 1 of Act 87 of 1993

1. Section 1 of the Non-Proliferation of Weapons of Mass Destruction Act, 1993, is hereby amended-

- (a) by the deletion of the definition of "Atomic Energy Corporation"; and
- (b) by the insertion after the definition of "sample" of the following definition:

"South African Nuclear Energy

Corporation' means the South African Nuclear Energy Corporation Limited established by section 3 of the Nuclear Energy Act, 1999:".

Amendment of section 4 of Act 87 of 1993

2. Section 4 of the Non-Proliferation of Weapons of Mass Destruction Act, 1993, is hereby amended by the substitution in paragraph (h) of subsection 2 for the words "Minister of Mineral and Energy Affairs" of the words "Minister of Minerals and Energy".

Substitution of section 5 of Act 87 of 1993

3. The following section is hereby substituted for section 5 of the Non-Proliferation of Weapons of Mass Destruction Act:

"Objects of Council

5. The objects of the Council are, subject to the Import and Export Control Act 1963 (Act No 45 of 1963), the Armaments Development and Production Act 1968 (Act No.57 of 1968), and the Nuclear Energy Act, 1999, and in co-operation and consultation with Armscor and the Minister of Minerals and Energy (acting as the national authority with regard to the implementation of the Safeguards Agreement between the Republic and the International Atomic Energy Agency for the application of the safeguards in connection with the Treaty on the Non-Proliferation of Nuclear Weapons), to control register and inspect controlled goods, and to verify the import, export, re-export, transit and end-use of controlled goods."

Substitution for "Minister of State Expenditure" in Act 87 of 1993

4. The Non-Proliferation of Weapons of Mass Destruction Act, 1993, is hereby amended by the substitution for the words "Minister of State Expenditure", wherever they occur, of the words "Minister of Finance".

DEPARTMENT OF MINERALS AND ENERGY REPORT TO THE PORTFOLIO COMMITTEE ON MINERALS AND ENERGY ON

ISSUES RAISED DURING THE PUBLIC HEARINGS ON THE NUCLEAR ENERGY BILL (B10-1999) AND THE NATIONAL NUCLEAR REGULATOR BILL (B11 - 1999)

COMMENTS CONSIDERED