

DEPARTMENT OF PUBLIC WORKS
PROPOSED AMENDMENTS TO THE GOVERNMENT
IMMOVABLE ASSET MANAGEMENT BILL [B1-2006]

SECTION 1: DEFINITIONS

1.	DEFINITION	<p>"acquire" and "immovable asset"</p> <p>"acquire" in relation to an immovable asset—</p> <p>(a) for national government, means acquisition through construction, purchase, lease, acceptance of a gift; expropriation or exchange; and</p> <p>(b) for provincial government, means "acquire" as defined in the relevant provincial land administration law;</p> <p>"immovable asset" means any immovable asset owned or leased by the state, excluding any right contemplated in the Mineral and Petroleum Resources Development Act, 2002 (Act No. 28 of 2002);</p>
2.	COMMENT	<p>Gauteng DPRTW:</p> <p>The manner in which two terms are defined in the Bill, namely "acquire" and "immovable asset" causes some confusion. "Acquire" is defined with reference to relevant provincial land administration law, while immovable asset is defined as an "immovable asset owned or leased by government excluding any right contemplated in the Mineral and Petroleum Resources Development Act". The confusion is caused in respect of the use of the term "acquire" in sections 4(2)(b)(i) and (ii), where a custodian is granted the power to "acquire" an "immovable asset". To make the point a little more clearly, because of the way "immovable asset" is defined, in section 4(2)(b) the custodian is granted the power to "acquire" something that is already in control of the state, either by way of ownership or lease. It is our view that this is probably not the intention of the drafters and that the drafters wish to provide for the power of the custodian to bring immovable property into the control of the state. The most obvious way of clearing the confusion is to distinguish between immovable assets under the control of the state and immovable property that is outside the control of the state. We trust the drafters will consider the issues and amend the Bill appropriately.</p>
3.	DPW RESPONSE	<p>In order to address the concern above, it should be noted that when custodianship is transferred across spheres of government it becomes a purchase or donation which is already covered in the definition. However, the transfer of custodianship within the same sphere of government requires clarification. It is recommended that the definition of "acquire" should be extended to include transfer of custodianship between organs of state within the same sphere of government [in sub (a) and (b)].</p> <p>As a result of the amendment to the definition of "acquire" a new definition of "custodianship" is required and the definition of custodianship requires an amendment of section 18.</p>
4.	PROPOSED AMENDMENT	See proposed amendments in DPW Proposal to Portfolio Committee.

5.	COMMENT	Gauteng DPRTW: Is an "immovable asset" the same concept as "immovable property" used in the different Land Administration Acts and the Deeds Registries Act? This could cause confusion. Does the definition include "right to leasehold" and "roads" for instance?
6.	DPW RESPONSE	The word asset is a more encompassing term than property and is used specifically to include forests, roads waterworks, etc, which would be exempted in terms of the Bill. Immovable asset if not defined will include all the common law rights, including a right in land. The word asset furthermore aligns with the asset management concept as embodied in the suites of legislation administered by National Treasury. The inclusion of the words "and any right therein" in the definition of "immovable asset" is proposed to clarify the scope of the rights that the concept of "immovable asset" embraces.
7.	PROPOSED AMENDMENT	See proposed amendments in DPW Proposal to Portfolio Committee .
8.	COMMENT	Council for the Built Environment: Is the use of the word "asset" appropriate as it is primarily an accounting term. The user does not necessarily "use" or "occupy" an asset. The rail network is given as an example.
9.	DPW RESPONSE	See response above.
10.	COMMENT	DOYLE/RIVETT-CARNAC PARTNERSHIP: Terminology is important. The word "asset" is used for what appears to be "facilities". Tertiary institutions are increasingly referring to "facilities management".
11.	DPW RESPONSE	Facilities management is seen as a component of immovable asset management. The word asset furthermore aligns with the asset management concept as embodied in the suites of legislation administered by National Treasury.
12.	PROPOSED AMENDMENT	None
13.	COMMENT	LAMACS SOLUTIONS (PTY) LTD Immovable asset is the right term. However, it must be expanded because there is not a common understanding of what an immovable asset is. Furthermore distinction should be made for infrastructure assets and non-infrastructure assets.
14.	DPW RESPONSE	Immovable assets include: <ul style="list-style-type: none"> • Accommodation (refers to all buildings used by a department in the execution of its functions. This may include specific functional buildings i.e. prisons, schools, police stations, hospitals, libraries, clinics and office and residential accommodation. This would also include all infrastructure that forms part of accommodation); and • Land (with or without structures). • Rights held by the State over privately owned immovable assets (e.g. servitudes, right of resumption, right of first refusal, etc) There is an inherent danger in defining the word "immovable asset", as a definition could exclude items which are deemed to be "immovable assets" by the law, and legal precedent gives sufficient guidelines in this regard.
15.	PROPOSED AMENDMENT	None

16.	COMMENT	SAMUELS CONSULTING "immovable asset" is defined incorrectly. The normal legal definition of "immovable asset" include land and buildings, whereas the above bill narrows it to the wording "any immovable asset owned or leased by the government". It can be argued that the definition implies that land and/or building cannot be an immovable asset if it is not owned by the government which of course makes no sense.
17.	DPW RESPONSE	Refer to DPW response above.
18.	PROPOSED AMENDMENT	See proposed amendments in DPW Proposal to Portfolio Committee .
19.	COMMENT	SAMUELS CONSULTING In my previous correspondence I specifically requested that the administration indicate to me if it was intended that the Bill should also deal with the question of vacant land owned or leased by government and specifically the question of its distribution, not forgetting, in this context, the constitutional imperative as prescribed in section 25(5) which deals with equitable access to land. In this regard I have not received a reply either way and hence my preliminary conclusion is that it appears to be yet another travesty of justice. The apparent lack of openness in dealing with the land aspect of immovable property in the Bill is potentially reviewable by the courts on a test of reasonableness of legislative measures Although the bill is not the main instrument of law for the realization of land rights, I contend that if it addresses that particular issue in one way or another, it would go a long way in assisting this country in its land reform challenge and it is a chance that cannot be missed.
20.	DPW RESPONSE	"The realization of land rights" as referred to above, is incorporated as one of the principles of immovable asset management and is duly incorporated in section 5(1)(f).
21.	PROPOSED AMENDMENT	None

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21A.	DPW RECOMMENDATION	The definition of "this Act" is amended on advice from the State Law Advisors.
21B.	PROPOSED AMENDMENT	See proposed amendments in DPW Proposal to Portfolio Committee .

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22.	DEFINITION	"user" means a national or provincial department that uses an immovable asset to perform its functions and includes a custodian in relation to an immovable asset that it occupies or intends to occupy, represented by its Minister of such national department, Premier of a province or MEC of such provincial department, so designated by the Premier of that province.
23.	COMMENT	Gauteng DPRTW: With regard to the definition of "user", we note a lack of coherence between the definition of "user" and section 6(1)(ii) in so far as in

		terms of the definition, a custodian is a "user" only to the extent that it occupies or intends to occupy an immovable asset, but section 6(1)(ii) provides for the custodian to draw up a user immovable asset management plan in respect of immovable asset which it does or intends to use "in support of its own service delivery objectives". In short, the wording of section 6(1)(ii) provides scope for a custodian to be a "user" in more ways than simply by being an occupier as provided for in the definition of the term "user".
24.	DPW RESPONSE	It is expected of the custodian to prepare both a custodian immovable asset management plan (C-AMP) that incorporates all the user plans as well as its own user immovable asset management plan (U-AMP) for assets that it occupies itself.
25.	PROPOSED AMENDMENT	The words "which it uses or intends to use in support of its own service delivery objectives" is inserted in the definition of "user" in order to align the definition with the text in 6(1)(a)(ii). See proposed amendments in DPW Proposal to Portfolio Committee .

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26.	DEFINITION	"performance"
27.	COMMENT	Council for the Built Environment: A definition for performance should be included as it is used frequently and will give great rise to confusion and dispute.
28.	DPW RESPONSE	"performance" is defined in the Oxford dictionary as, amongst others, "a notable action or achievement" and the "process or manner of performing". Sections 4(3)(a) and 17(3)(c) refer to "performance" in its second dictionary meaning. Sections 7© and 13(1)(d)(ii) refer to a performance assessment of the immovable asset and sections 13(1)(e) and 14(1)(e) both refer to a performance measurement system. Last mentioned four sections will be elucidated by standards issued by the Minister in terms of section 19(1)©.
29.	PROPOSED AMENDMENT	None

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30.	DEFINITION	"best use"
31.	COMMENT	DOYLE/RIVETT-CARNAC PARTNERSHIP: The Bill lacks a definition on "best use". Users use property often for historical purposes and not necessarily for best use. Several properties are underutilized. As a first step the purpose of the asset should be investigated because it may be held by the wrong user.
32.	DPW RESPONSE	The principles in section 5(1) comprehensively deal with the strategic approach to efficient and effective immovable asset management.
33.	PROPOSED AMENDMENT	None.

SECTION 2: APPLICATION OF ACT

34.	SECTION 2	2. This Act applies to organs of state in the national and provincial spheres of government, excluding public entities.
35.	COMMENT	<p>Council for the Built Environment: It is noted that the Bill applies to all organs of state in the national and provincial spheres of government, excluding public entities. The Bill thereby excludes the local spheres of government, which is the level charged with services delivery in the first instance – note the use of the term <i>service delivery</i> in section 39(c).</p> <p>It would seem therefore that applying immovable property management at this tier of government would in effect make a larger contribution to service delivery than at the primary and secondary tiers of government inasmuch as the Bill seeks to advance the department's ability to perform its functions. Excluding this tier of government in the Bill raises the question of the validity of the ultimate purpose of effectiveness versus expediency.</p>
36.	DPW RESPONSE	<p>In terms of Batho Pele all spheres of government are responsible for service delivery and should have service delivery objectives. It is not only the domain of local government.</p> <p>The Bill's scope is limited to national and provincial government, as approved by Cabinet. However, Cabinet instructed that the principles of sound immovable asset management be extended to all spheres of government in a phased approach. As agreed with the Portfolio Committee, extension of GIAMA to local government has been entrusted to DPLG, with the active assistance and support of DPW. In a third phase, the extension of GIAMA to the various public entities will be dealt with in conjunction with relevant departments (eg. DoT and DPE) and taking due consideration of applicable legislation.</p>
37.	PROPOSED AMENDMENT	None
38.	COMMENT	<p>Gauteng DPRTW: DPTRW suggests that, for the sake of clarity, "public entities" as referred to in this section be defined in section 1. This would be by reference to the definition found in the PFMA.</p>
39.	DPW RESPONSE	Definition will be included to provide clarity
40.	PROPOSED AMENDMENT	See proposed amendments in DPW Proposal to Portfolio Committee.
41.	COMMENT	<p>Construction Education and Training Authority: It is suggested that SETA's are included in the use of government immovable assets. There are currently 23 SETA's, most with regional offices. If they rent space from government premises they might save cost on rent and maximize their cash flow for skills development.</p>
42.	DPW RESPONSE	Please refer to the comment above.
43.	PROPOSED AMENDMENT	None

44.	COMMENT	<p>DEVELOPMENT BANK OF SOUTHERN AFRICA</p> <p>We note that the bill applies to national and provincial departments but excludes public entities. Presumably this means that provincial roads are in and national roads administered by SANRAL are out, unless the DoT is the custodian and SANRAL the user. If that is so, then there should be more clarity on this. Or is SANRAL not seen as a user in terms of the definition in line 45? The same argument could apply to ACSA and the airports – which entity actually owns the airports? What will happen when all the dams and canals are transferred from DWAF to the proposed National Water Resource Agency sometime in the near future.</p>
45.	DPW RESPONSE	The Bill will apply to all assets directly owned or leased by the national and provincial governments. Therefore, an asset such as an airport held by ACSA does not currently fall within the ambit of the Bill. Also refer to the response above.
46.	PROPOSED AMENDMENT	None

SECTION 3: OBJECTS OF ACT

47.	SECTION 3	<p>3. The objects of this Act are to—</p> <p>(a) provide a uniform immovable asset management framework to promote accountability and transparency within government;</p> <p>(b) ensure effective immovable asset management within government;</p> <p>(c) ensure coordination of the use of immovable assets with service delivery objects of a national or provincial department and the efficient utilisation of immovable assets;</p> <p>(d) optimise the cost of service delivery by—</p> <p>(i) ensuring accountability for capital and recurrent works;</p> <p>(ii) the acquisition, reuse and disposal of an immovable asset;</p> <p>(iii) the maintenance of existing immovable assets;</p> <p>(iv) protecting the environment and the cultural and historic heritage; and</p> <p>(v) improving health and safety in the working environment.</p>
48.	COMMENT	<p>Gauteng DPRTW:</p> <p>DPTRW supports the objectives set out in the provision.</p>
49.	DPW RESPONSE	Noted
50.	PROPOSED AMENDMENT	None

SECTION 4: RELATIONSHIP BETWEEN AND RESPONSIBILITY OF CUSTODIAN AND USER

51.	SECTION 4	<p>4. (1) The departments managed by the following executive organs of state within the national and provincial spheres of government are custodians:</p> <p>(a) The Minister, in relation to immovable assets that vest in the national government, except in cases where custodial functions were assigned to other Ministers by virtue of legislation before the commencement of this Act;</p> <p>(b) subject to subsection (5), the Minister responsible for Land Affairs, in relation to immovable assets acquired for land reform, as</p>
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		<p>well as immovable assets that vest in the national government, situated within the former homelands, except in cases where custodial functions in respect of those areas were assigned to another Minister by virtue of specific legislation before the commencement of this Act; and</p> <p>(c) A Premier of a province or an MEC designated by the Premier, in relation to an immovable asset that vests in a provincial government.</p> <p>(2) A custodian—</p> <p>(a) acts as the caretaker in relation to an immovable asset of which it is the custodian;</p> <p>(b) may—</p> <p>(i) in the case of a national department, acquire and manage an immovable asset as contemplated in section 13 and, subject to the State Land Disposal Act, 1961 (Act No. 48 of 1961) or any other Act regulating the disposal of state land, dispose of that immovable asset;</p> <p>(ii) in the case of a provincial department, subject to the relevant provincial land administration law, acquire and dispose of that immovable asset;</p> <p>(c) is, subject to section 18, liable for any action or omission in relation to an immovable asset of which it is the custodian, excluding an act or omission in good faith.</p> <p>(3) The Minister or MEC of a user is—</p> <p>(a) subject to section 18, responsible for the performance of the functions assigned to it by this Act or any agreement with the custodian of the immovable asset that it occupies; and</p> <p>(b) liable for any act or omission in relation to the immovable asset concerned, excluding an act or omission in good faith.</p> <p>(4) A custodian and user must settle any dispute between them in the manner contemplated in the Intergovernmental Relations Framework Act, 2005 (Act No. 13 of 2005).</p> <p>(5) Despite subsection (1)(b) and section 38 of the PFMA, the Minister performs the custodial functions referred to in section 13(1), (2) and (3)(a) in relation to immovable assets situated in the former homelands and occupied by a national department in support of its service delivery objectives.</p> <p>(6) For the purposes of this section, the words "former homelands" bears the same meaning assigned to it in Schedule 6 to the Constitution.</p>
52.	COMMENT	<p>Gauteng DPRTW:</p> <p>Section 4 is unique in so far as it refers to the custodian of assets that "vest" in provincial government, although this term is not defined. We are of the view that this term is a reference to item 28(1) of Schedule 6 of the Constitution and section 239 of the Interim Constitution. By using this terminology, the Bill deliberately seeks to include all assets into the care of the custodian that are not formally transferred into the name of provincial government, but that "vest" in provincial government following the provisions of item 28(1) of Schedule 6 of the Final Constitution read together with section 239 of the Interim Constitution. By virtue of the use of the term "vest" the custodian is deemed to have custodial functions in respect of properties it does not necessarily have the means to deal with prior to a confirmation of the vesting by the issuance of an Item 28(1) certificate by national government. Also, if there is a conflict about where a property vests, who will be deemed to have been the custodian? The sphere of government acting as the custodian or the sphere of government claiming that the property rightly vests in it? We are of the view that using the term "vest" in this section is merely an attempt to by-pass the problems surrounding the certification of ownership.</p> <p>Also the use of the term "vest" in connection with the term "immovable asset" in this section raises problems similar to the use of the term "acquire" in relation to "immoveable asset". The Final Constitution refers to immovable <i>property</i> that is <i>owned</i>, whereas the</p>

		Interim Constitution refers to all assets which vest. This term has the ordinary meaning to "confer or bestow (power, property, etc) on" or "give (someone) the legal right to power, property, etc." Accordingly the term "vest" provides for a wider range of options than ownership or lease (that limits the definition of immovable property). We are uncertain how this should be dealt with by the drafters of the Bill, but raise the concern that the definition of the term "immovable asset" is problematic.
53.	DPW RESPONSE	<p>In terms of the provisions of the Interim Constitution "vesting" of state land took place on 27 April 1994. In law therefore, custodianship of the various pieces of state land is finalised. The administrative confirmation of that vesting has proven to be a lengthy process in view of the extent of the properties held by the state.</p> <p>Administrative confirmation takes place through the issuing of a certificate in terms of the Constitution (Item 28(1) of Schedule 6) and subsequent registration or endorsement in the various Deeds Offices. The process of issuing Item 28(1) certificates and the registration/endorsement is the line-function responsibility of the Minister of the Land Affairs and the Registrars of the various Deeds Offices.</p> <p>There are three "categories" of immovable assets that "vest" in terms of Item 28(1)</p> <ul style="list-style-type: none"> • Assets that have been confirmed vested (already registered/endorsed in a Deeds Office) • Assets where the vesting has not yet been confirmed • Assets where vesting is in dispute
54.	PROPOSED AMENDMENT	None
55.	COMMENT	<p>Gauteng DPRTW:</p> <p>Further it seems odd that in section 4(2)(b)(ii), a provincial department may acquire and dispose of land, but not actually manage it. The purpose of the Bill is to authorize custodians to manage immovable assets and to hold them responsible for such management. If the provincial department, which is the custodian, may not manage its assets then who will?</p>
56.	DPW RESPONSE	In section 4(2)(b)(ii) the word "manage" will be added after the word "acquire".
57.	PROPOSED AMENDMENT	See proposed amendments in DPW Proposal to Portfolio Committee .
58.	COMMENT	<p>Gauteng DPRTW:</p> <p>In addition, the language used in section 4(2)(b) may be inconsistent with the definition of "immovable asset" in section 1. Section 1 defines "immovable asset" as "any immovable asset owned or leased by government...". As a consequence, it does not make sense for section 4(2)(b) to talk about government departments being able to "acquire" an "immovable asset" as this indicates acquisition of something that by definition is already owned or leased by government. A similar problem may well arise in relation to other references to the term "immovable asset" as currently defined elsewhere in the Bill.</p>
59.	DPW RESPONSE	This issue has been addressed in DPW's response to Gauteng DPRTW's comment on the definition of "immovable asset" on page 1 of this document.
60.	PROPOSED AMENDMENT	See proposed amendments in DPW Proposal to Portfolio Committee .

61.	COMMENT	DEVELOPMENT BANK OF SOUTHERN AFRICA 4(2)(c) and 4(3)(a) – should there be a requirement for users and custodians to enter into an agreement, whether it be a Service Level Agreement (for delivering a service one to another) or a simple delineation of responsibilities? It seems odd to make the custodian “liable for any action” with no apparent recourse or delegation of responsibility to the user.
62.	DPW RESPONSE	An agreement, delegation or assignment is presupposed in these subsections. These are matters that will be dealt with in detail in the Regulations that will be promulgated under the Bill.
63.	PROPOSED AMENDMENT	None.

SECTION 5: PRINCIPLES OF IMMOVABLE ASSET MANAGEMENT

64.	SECTION 4	<p>5. (1) The following are principles of immovable asset management:</p> <p>(a) An immovable asset must be used efficiently and becomes surplus to a user if it does not support its service delivery objectives at an efficient level and if it cannot be upgraded to that level;</p> <p>(b) to minimise the demand for immovable assets, alternative service delivery methods that do not require immovable assets must be identified and considered;</p> <p>(c) In relation to an acquisition, it must be considered whether—</p> <p>(i) a non asset solution is viable;</p> <p>(ii) an immovable asset currently used by the state is adequate to meet a change in its service delivery objectives; and</p> <p>(iii) the cost of the immovable asset as well as operational and maintenance cost throughout its life cycle justifies its acquisition in relation to the cost of the service;</p> <p>(d) Immovable assets that are currently used must be kept operational to function in a manner that supports efficient service delivery;</p> <p>(e) When an immovable asset is acquired or disposed of best value for money must be realised;</p> <p>(f) In relation to a disposal, the custodian must consider whether the immovable asset concerned can be used —</p> <p>(i) by another user or jointly by different users;</p> <p>(ii) in relation to social development initiatives of government;</p> <p>(iii) in relation to government’s socio-economic objectives, including land reform, black economic empowerment, alleviation of poverty, job creation and the redistribution of wealth.</p> <p>(2) The Minister may, by notice in the <i>Gazette</i>, identify additional principles which apply to an immovable asset strategic plan, acquisition plan, operation and maintenance plan and disposal plan.</p>
65.	COMMENT	<p>Gauteng DPRTW:</p> <p>DPTRW considers it important that any other principles to be gazetted (further to subsection (2)) be developed in consultation with provincial governments. Therefore, DPTRW suggests subsection (2) be expanded to require the Minister to consult with provincial governments before any notice of new principle is issued. This comment extends to consultation in regard to sections 19(1)(b), (c) and 19(2).</p> <p>DPTRW also support the inclusion of social return objectives in subsection (f) in relation to disposal of assets. Would it make sense for such concepts to be included more generally in the principles?</p>

66.	DPW RESPONSE	The argument of the and the consultation process described in section 20. means for en consultation on both Publication in the Gazette government is standard however that such action takes p refer to the preferred section 20.
		Comments in second
67.	PROPOSED AMENDMENT	See proposed amendment to Portfolio Committee
68.	COMMENT	Construction Education: CETA is currently ing Construction Centers excellence and partnership with Publication of immovable assets uld be used currently used but mig of relevant construction trades. As r for training in the first as centers of excellence aspect of development and pro between CETA and the Dept of Public W
69.	DPW RESPONSE	This is the topic for CETA and the Department Bill does not agreement and the prtion 5 underpin the respor of custodian in a responsible manner
70.	PROPOSED AMENDMENT	None
71.	COMMENT	DEVELOPMENT BANK 5(1)(f)(iii) – is it wise (government's socio-economic objectives) wh In particular one can fition of wealth" being subjugate.
72.	DPW RESPONSE	Although it is strictly scifice in the drafting of legi to include re time, DPW is comfortable to government's socio-economic objectives in
73.	PROPOSED AMENDMENT	None

SECTION 6 ASSET MANAGEMENT

74.	SECTION 6	<p>6. (1) and as part of its stratanning process Regulations, 2001, the</p> <p>(a) a custodian must</p> <p>(i) prepare a management plan, to be as a custodian relates assets which are in its cus</p> <p>(ii) prepare a management plan, wlates to all th uses sort of its own service delivjectives; and</p> <p>(b) a user must prepare an immovable asset management pla management movable assets which thases or inten</p> <p>(2) todian or user immovable management</p> <p>(a) meet the obje</p>
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