

**INTERIM GUIDE FOR CREATING PUBLIC  
ENTITIES AT  
THE NATIONAL SPHERE OF  
GOVERNMENT**



**Department of Public Service and Administration**

**National Treasury**

**March 2002**

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# **DRAFT INTERIM GUIDE FOR CREATING PUBLIC ENTITIES (PEs) AT THE NATIONAL SPHERE OF GOVERNMENT**

## **1. INTRODUCTION**

Cabinet approved on 4 April 2001, as an interim measure, the broad process for the creation of national PEs as set out in Annexure A. This broad process is to remain in operation until it is replaced and/or updated by an appropriate institutional framework for PEs.

Cabinet also approved that guidelines be developed which elucidate the broad process to create national PEs as well as on staff transfers between the Public Service and PEs. This guide therefore is the outcome of the above decision.

The Guide is intended to be a living document, which will be updated with policy developments, agreements (e.g., with organised labour regarding staff and restructuring matters) and frameworks that impacts on PEs as well as the best practice experiences of Departments. The Guide will remain in operation until it is replaced and/or updated by an appropriate institutional framework for PEs currently being developed through the PE project.

This guide focuses on:

- (a) The rationale for agencification.
- (b) Mandates for the creation, listing and classification of PEs.
- (c) Elucidating the process to create PEs.
- (d) Deploying (transferring) public servants to PEs which include -
  - the process to deploy staff (transfer) from the Public Service to PEs; and
  - withdrawals from the Government Employees Pension Fund.

## **2. RATIONALE FOR AGENCIFICATION**

To improve the quality and cost of services available to citizens, Government is committed to "do more with less". One mechanism has been to create semi-autonomous entities at arm's length from parent ministries.

PEs are established in the Public Sector, but outside the Public Service, typically for reasons of -

- (a) strategic, social or economic intervention by the State or to deal with strategic risks and dangers that the State or society faces to its security, health, prosperity or wellbeing; and/or
- (b) adopting commercial and business principles in service delivery when it is required; and/or
- (c) signalling that there is need for objectivity and more operational autonomy, yet retaining accountability in the delivery of services.

The formal definition of a national PE as set out in Section 1 of the Public Finance Management Act, 1999 (PFMA) is as follows:

- (a) “A board, commission, company, corporation, fund or other entity (other than a national business enterprise) which is-
- (i) established in terms of national legislation;
  - (ii) fully or substantially funded from either the National Revenue Fund or by way of tax, levy or other money imposed in terms of national legislation; and
  - (iii) accountable to Parliament.”
- (b) “A national government business enterprise means an entity which-
- (i) is a juristic person under the ownership control of the national executive;
  - (ii) has been assigned financial and operational authority to carry on a business activity;
  - (iii) as its principal business, provides goods or services in accordance with ordinary business principles; and
  - (iv) is financed fully or substantially from sources other than-
    - the National Revenue Fund; or
    - by way of a tax, levy or other statutory money.”

(“**ownership control**”, in relation to an entity, means the ability to exercise any of the following powers to govern the financial and operating policies of the entity in order to obtain benefits from its activities:

- (a) To appoint or remove all, or the majority of, the members of that entity’s board of directors or equivalent governing body;
- (b) to appoint or remove that entity’s chief executive officer;
- (c) to cast all, or the majority of, the votes at meetings of that board of directors or equivalent governing body; or
- (d) to control all, or the majority of, the voting rights at a general meeting of that entity.)

PEs in accordance with their formats have different levels of autonomy. Government Business Enterprises, which generate their own income, have the most autonomy as these entities operate in a competitive market place and decisions are made in accordance with business principles. These entities normally pay tax and could in future be required to pay dividends. PEs, other than the Government Business Enterprises, are normally extensions of a department with the mandate to fulfil a specific economic or social responsibility of Government. These entities are more reliant on Government funding and public money, either by means of a transfer from the Revenue Fund or through statutory money. As such, these entities have the least autonomy and are also accountable to Government for this money. In addition, the relevant Minister (hereafter called “the Executive Authority”) has the responsibility to approve these entities’ annual budget.

### **3. MANDATES FOR THE CREATION, LISTING AND CLASSIFICATION OF NATIONAL PEs**

#### **3.1 Minister for the Public Service and Administration (MPSA)**

The competency of the MPSA is aimed at the proper macro organisation of the Public Service by ensuring that any new or existing public function is allocated/transferred to the appropriate sphere of government, department and/or PE and to eliminate any duplication of functions. This competency involves:

- (a) Advising the President regarding the establishment or abolition of any department or organisational component in the national sphere of government (Section 3(3)(a) of the Public Service Act, 1994 (PSA)).
- (b) Making a determination regarding the allocation of any function to, or the abolition of, any department or the transfer of any function from one department to another or from a department to any other body or from any other body to a department (Section 3(3)(b) of the PSA)

In cases where a PE is established for a new or existing function, the MPSA must make a determination regarding the allocation/transfer of such a function to a PE.

The allocation/transfer of functions and concomitant resources should be effected as far as possible with effect from the start of a financial year.

### **3.2 Minister of Finance (MoF)**

The competency of the MoF is aimed at the establishment of uniform reporting and listing of all PEs, nationally and in the provinces, by ensuring that any new or existing PE is listed and accountable to Government. This competency involves making a determination regarding the allocation of monies from Government, including statutory funding, to a public entity or future public entity and ensuring that such an entity's funding requirements and mandate are within the ambit of the MTEF.

The accounting officer of a department must consult with and seek prior written consent of the National Treasury on any new PE which is intended to be established (Section 38(1)(m) read with Section 54(2) of the PFMA).

The MoF must list and classify PEs, by notice in the national Government Gazette (Section 47 and 48 of the PFMA). The current listing and classification of PEs is set out in Schedules 2 and 3 of the PFMA. Executive authorities must request such a listing and classification in writing. At the national sphere of government, PEs are classified as:

- (a) Major Public Entities (Schedule 2).
- (b) National Public Entities (Schedule 3A).
- (c) National Government Business Enterprises (Schedule 3B).

## **4. PROCESS TO CREATE PEs**

The broad interim process for creating a PE as approved by Cabinet on 4 April 2001 is set out in Annexure A. This broad process is elucidated below, with the following headings:

- (a) Step 1: Preparing a business case.
- (b) Step 2: Assessing the business case.
- (c) Step 3: Formalising the establishment of a PE.
- (d) Step 4: Implementing the establishment of a PE.

The process to create a PE is graphically set out in Annexure B.

## **4.1 Step 1: Preparing a Business Case**

An executive authority is required to prepare a business case for the intended PE. The business case must be informed by situation analysis and strategic plans, identifying and assessing service delivery options, governance issues and recommending the appropriate service delivery option. Departments could at own cost use consultants to develop a business case. The actions and information presented below (not in chronological order) form part of the business case:

### ***4.1.1 Situation analysis, compiling and submitting strategic plans***

The following actions must be conducted and reported on:

- (a) Strategic assessment of the service which involves:
- Considering strengths, weaknesses, opportunities and threats that exist in the current mode of service delivery, strategic issues that management faces, alternative plans and strategies that were considered, the choices that were made, what management was forced/decided to eliminate due to constraints.
  - Analysing clients, state of markets and competitors - their location, strengths and weaknesses.
  - Mission and mandate analysis. Consider current legal mandates, how it is articulated (or changed, elaborated on), how management intends to implement the mission and the mandates it has set.
  - Environmental assessment such as social, environmental, technological, economic, regulatory, political, geographical etc., risks and opportunities and with due consideration of the indicators which measure sustainable development issues.
  - Assessing the risks associated with the current and new service option. Departments should aim to explore the broad categories of risks set out in Chapter G of the Public-Private Partnership Manual of the NT (available on the internet at [www.finance.gov.za](http://www.finance.gov.za)) and which are summarised in Annexure C.
  - Defining the service as an output specification. This is simply a statement of the needs to be satisfied by the service.
- (b) Submitting a Strategic Plan of the responsible department (designated by its executive authority, as the department responsible for the PE) for the MTEF period commencing 1 April 2002. The amended departmental Strategic Plan that provides for the intended service delivery option's (intended PE) impact on the operations of the department and the budget for the period of the MTEF must be submitted. (See Public Service Regulation B.1, Part III: Planning, Work Organisation and Reporting and Treasury Regulation 5 with due consideration of the Treasury Guidelines: Integrating Strategic Plans into the Budget Process.).

### ***4.1.2 Identification and assessing service delivery options***

Before selecting the agency option, services should be assessed in order to demonstrate the advantages of agencification over other service delivery options. There is virtually no limit to the ingenuity of departments to invent new organisational arrangements and service delivery options in order to address service delivery challenges as depicted below -

- (a) abolish/abandon services which are not critical to the public interest;
- (b) privatise services;
- (c) combine services;
- (d) transfer elsewhere in the public service or to an existing PE;
- (e) establish a shared service centre;
- (f) centralised or decentralise services;
- (g) establish a trading account;
- (h) enter into public- or public-private partnerships;
- (i) effect business process improvement on existing services; and
- (j) vest services in a new PE.

In order to lend strategic focus in assessing the consequences of various service delivery alternatives, to narrow the range of acceptable alternatives, to account for policy imperatives and political variables, and to anticipate problems arising from selecting a particular alternative, the following questions should be motivated:

Strategic Focus Area	Questions
Public Interest	<ul style="list-style-type: none"> <li>• Does the service continue to serve a public interest?</li> <li>• Is the service still required, and why/ why not?</li> </ul>
Role of Government	<ul style="list-style-type: none"> <li>• Indicate if there is a legitimate and necessary role for government in this service?</li> <li>• How will the service contribute to the implementation of government and department policy?</li> <li>• What is the capacity and ability of the department to render the service?</li> </ul>
Jurisdiction Alignment	Is the lead responsibility for this service assigned to the right sphere of government (national/provincial/local) and department?
External Partnerships	<ul style="list-style-type: none"> <li>• Could, or should the service be provided in whole or in part by the private or voluntary sector (NGO's)?</li> </ul>
Access to services and service delivery improvement	<ul style="list-style-type: none"> <li>• How will the service delivery options improve access to services?</li> <li>• What is the relative size / extent of the service (e.g. range of services offered, how are services offered, by which means, etc)?</li> <li>• How complex is the service?</li> <li>• How will the service result in service delivery improvement (quality improvement, obstacles to overcome, flexibility, innovation, utilising specialised knowledge and/or expertise, improving efficiency, catering for special group interests, need for neutrality and/or objectivity, eliminating duplication of services, etc)?</li> <li>• What are the minimum service standards for services?</li> <li>• What are the indicators for assessing service standards?</li> </ul>
Business Principles	<ul style="list-style-type: none"> <li>• What benefits could be attained by operating/managing the service according to business principles (full commercial costing, performance measures and indicators to assess performance, etc)?</li> <li>• If the service continues within the existing government context how could its efficiency and effectiveness be improved instead of creating a PE?</li> </ul>
Affordability	<ul style="list-style-type: none"> <li>• Can the cost for the service be accommodated in the budget of the department, given its existing commitments?</li> <li>• Is the expenditure (capital, direct operating cost, indirect costs and recurrent cost) associated with the service delivery options less than the available budget? What savings could be generated?</li> <li>• What expenditure (establishment cost, cost to transfer staff etc.), if any, will need to be incurred by the State for the service delivery options? If any, is this budgeted in the MTEF and beyond?</li> <li>• Are the different options affordable? What is the option viability? How</li> </ul>

	<p>potentially profitable, over what time frame?</p> <ul style="list-style-type: none"> <li>• What recurrent and sustainable revenue and other sources of revenue (e.g. user pay levies, partnership contributions and transfer payments) could the options generate?</li> <li>• Is there commercial/market interest in the option? If so, at what level (international investors, local companies, SMMEs)?</li> <li>• What capacity exists in the private sector in providing the service?</li> <li>• What is the total cost per service option in terms of capital, direct cost, and indirect cost less revenue?</li> </ul>
Value for money	<ul style="list-style-type: none"> <li>• Are service options providing more value than the current service arrangement in terms of time, cost, price, quality, quantity, or risk transfer, or a combination thereof?</li> <li>• What broader social/economic benefits could be derived (job creation, skills development, conservation improvement, foreign exchange income, improved public services, local economic development, etc)?</li> </ul>

### **4.1.3 Governance Issues**

An executive authority must also attach the draft enabling legislation, which sets out the core mandates, functions and objectives of the intended entity and its controlling body. Guidelines for the drafting of a PE-enabling Bill, are set out in Annexure D.

A description of the following governance issues is required:

- (a) Organisation:
- The kind of organisation and the value statement to inform external perceptions.
  - The values being promulgated within the agency that shape external perceptions.
  - The organisational structure that will best serve the activities to be carried out.
  - The relationship with the responsible department and any arrangement in terms of sharing resources and using the available infrastructure.
- (b) Human resource management:
- The number of required employees per grade, related salary bands and nature of employment (post establishment organogram).
  - The level and remuneration packages of the CEO and Chief Financial Officer positions.
  - The human resource migration plan to deploy staff from the Public Service to the PE in cases where an existing functions is being transferred to a PE. This plan should also indicate what measures will be taken to retrain/reskill deployed staff.
  - Details of the conditions of service that employees will qualify for and the cost of providing these conditions.

### **4.1.4 Recommending appropriate service delivery option**

An executive authority must:

- (a) Recommend the appropriate service delivery option.
- (b) Submit the business case, together with the classification and listing of the intended PE in terms of the PFMA, to the -

Director-General: Public Service and Administration  
 Attention: Senior Manager: Government Internal Consulting Service  
 Private Bag X 916  
 PRETORIA  
 0001

and

Director-General: National Treasury  
 Attention: DDG: Asset and Liability Management  
 Private Bag X 115  
 PRETORIA  
 0001

#### **4.2 Step 2: Assessing the Business Case**

A joint evaluation panel between the MPSA and the MoF, supported by their respective departments, will assess the business case for an intended PE. The joint evaluation panel will:

- (a) evaluate the level and remuneration package for the CEO's post;
- (b) evaluate the level of the positions of board members and the chairperson of a PE for remuneration purposes.
- (c) assess the business case in order for the MPSA and the MoF to coherently exercise their legislative competencies (The MPSA to allocate/transfer the function and the MoF to consent, classify and list the PE - See paragraph 3 above).
- (d) MPSA and MoF respectively, consent in writing to the establishment of the PE.

#### **4.3 Step 3: Formalising the Establishment of a PE**

The relevant executive authority must -

- (a) submit the necessary motivation and consent of the MPSA and the MoF to the relevant portfolio committee for discussion before it is submitted to Cabinet; then
- (b) inform Cabinet of the consent of the MPSA and MoF and request Cabinet for approval to introduce a Bill in Parliament for establishing the PE; then
- (c) table a Bill in Parliament for establishing the PE.

#### **4.4 Step 4: Implement the Establishment of a PE**

To effect the setting up of the PE, an executive authority must-

- (a) approve the initial organisation and post establishment structure for the PE;

- (b) appoint the Members of the controlling body/board for the PE in terms of its establishing act;
- (c) in the case where a PE is established for a new function, allocate/transfer resources to the PE where appropriate.
- (d) effect the transfer of the function and concomitant resources to the PE based on the following principles:
  - the relinquishing department shall transfer all concomitant resources, including staff, to the recipient PE;
  - the recipient PE shall co-ordinate the transfer;
  - the recipient PE shall accept accountability for the function on the date of transferring the function or the date on which its establishing act comes into operation;
  - the accounting officer of the relinquishing department shall retain accountability for matters originating prior to the date of transfer;
  - the transfer of personnel shall take place with due regard to the requirements of the Labour Relations Act (LRA), Act 66 of 1995 and appropriate Public Service Coordinating Bargaining Council agreements (PSCBC);
  - the transfer of assets and liabilities shall take place in accordance with Section 42 of the PFMA, which deals with the accounting officers' responsibility when assets and liabilities are transferred; and
  - adherence to budgeting and related matters set out in Treasury Regulation 6.
- (e) request in writing the listing and classification of a PE in terms of the PFMA.
- (f) ensure that the PE compiles and submits a borrowing programme and budgeted projection as set out below:
  - For an intended National Government Business Enterprise, the corporate plan and three-year borrowing programme (Treasury Regulation 29).
  - For an intended National PE, the strategic plan and 3-year budget projection (Treasury Regulation 30).

## **5. DEPLOYING (TRANSFERRING) PUBLIC SERVANTS TO PEs**

The discussion below represents practices and principles to deploy staff to PEs and handle withdrawals from the Government Employees Pension Fund. These practices and principles will be updated in accordance with appropriate PSCBC agreements.

### **5.1 Secondment of Public Service Staff to PEs**

Departments could consider seconding staff to a PE for a particular service(s) or for a stated period in terms of Section 15 of the PSA.

The recipient PE shall bear the inclusive cost of secondment unless both the department and the PE agree otherwise, or, the National Treasury approves another arrangement. (A similar

arrangement exists for secondments within the Public Service - see Public Service Regulation Chapter 1, VII B4.2).

## **5.2 Transfer of Contract of Employment**

In terms of Section 197 of the LRA, a collective agreement is not required if an undertaking is transferred as a going concern. Stated otherwise, a contract of employment may be transferred from one employer to another without the employee's consent if the whole or part of a business, trade or undertaking is transferred as a going concern.

The determination of the MPSA to allocate/transfer a function in terms of the PSA from a department to a PE and which forms part of assessing the business case (see paragraph 4, Step 2: Assessing the Business Case above) is regarded as transferring the whole or part of a business, trade or undertaking as a going concern.

Where establishing acts provide for specific arrangements regarding the transfer of contracts of employment, such provisions must be in line with the Government Employees Pension Law and Rules. In this regard Section 17.4 of the Government Employees Pension Act, 1996 stipulates as follows: "If any action taken by the employer or if any legislation adopted by Parliament places any additional financial obligation on the Fund, the employer or the Government or the employer and the Government, as the case may be shall pay to the Fund an amount which is required to meet such obligations".

## **5.3 Process of negotiation and deploying public servants to PEs**

It is however, good governance practice for employers to negotiate on the transfer of contracts of employment. Furthermore, the Public Service Job Summit Framework Agreement for the Transformation and Restructuring of the Public Service, January 2001, provides for the development and conclusion of a framework collective agreement to govern the transformation and restructuring process. The criteria for identifying affected personnel must be in accordance with the envisaged collective agreement.

It should be noted that a specific package of employee benefits referred to, as the "Change of Employer Package" will be negotiated with unions. Once agreement is reached with unions on the standardised package, there should be no need for further negotiations with unions on employee benefits specifically. However, negotiations with recipient entities will still be required on service benefits such as taking over of leave days.

Until the above-mentioned framework collective agreement and package of employee benefits have been concluded, the following guidelines are provided to facilitate the negotiation process for deploying public servants to PEs:

### **(a) Notification**

An executive authority may inform the relevant employee organisations in writing, prior to the transfer, of -

- the decision to initiate a process for the possible creation of a PE;
- the decision to transfer a function to a PE;

- the possible implications that such a decision may have on the relevant staff;
- the probable number of employees likely to be affected and their job categories/occupations;
- the date of implementation of the measure decided upon, which will also be the date of implementing the deployment of affected personnel;
- the conditions of service applicable to the transfer of the affected personnel's contracts of employment;
- possible implications for staff, should they opt not to be deployed; and
- informing staff on the full implications of withdrawing from the Government Employees Pension Fund (GEPF) and affording them all options according to the rules and regulations of the GEPF Law namely:
  - to remain a member of the GEPF;
  - elect dormant membership and to join the new fund from a current date. (The option of dormant membership is under review and could possibly be phased out.)
  - income tax requirements; and
  - the benefit structure of GEPF compared with the benefit structure of the fund that employees of the PE will belong to.

**(b) Negotiations regarding affected staff**

The responsible department, the prospective new employer and the representative employee organisations should meet as soon as possible after receipt of the written notification of the intention to deploy staff to a non-Public Service employer to discuss –

- criteria to identify affected personnel;
- alternatives to re-deployment;
- ways to minimise the number of employees affected;
- the date of implementing re-deployment;
- the names of affected employees;
- creation of a separate pension fund; and
- conditions of service applicable in the new work environment and treatment of employees to be re-deployed.

The following measures may serve as a basis for negotiating with the affected personnel and recipient PE:

- (a) Pension benefits, see paragraph 5.3(a), 'Notification', above.
- (b) Accumulated vacation leave credits (audited) as on the last day of service could be taken over by the new employer or paid out by the existing employer.
- (c) Payment of a *pro rata* Service bonus.
- (d) Guarantee scheme for housing loans to officers/employees in the public sector. If the new employer is not prepared to take over the relevant guarantee (new employer to issue a new guarantee after the previous employer cancelled the guarantee), the guarantee must be redeemed in terms of the measures regulating the Guarantee Scheme.

- (e) Service obligations. Exemption from all service obligations prescribed by the Department of Public Service and Administration/departments may be granted. For this purpose, service obligations include all contractual debt/outstanding contractual debt arising from study/training agreements and agreements with regard to military training.

NOTE: Before the possible release from contractual obligation can be considered, negotiations should be entered into with the receiving entity with a view to the possible cession of the obligations in this regard to the new employer.

**(c) Implementation**

After negotiations between the parties are concluded, the process to re-deploy affected employees should be implemented. In this regard, the executive authority should -

- issue a letter to each individual to be re-deployed, indicating the date on which re-deployment shall take effect, what payments may accrue to them and what advisory services are available to ensure smooth transfer to the new employer; and
- ensure that all payments owing to employees shall be available on the date when re-deployment takes effect, or as soon as possible thereafter, other than payments outside the executive authority's direct control (e.g. payments from the Government Employees Pension Fund).

**5.4 Treatment of personnel who could/opted not to be deployed to a PE**

The following measures may be considered to deal with personnel (affected personnel identified for deployment to a PE) who could/opted not to be deployed to the PE:

- (a) Retraining/reskilling and redeployment of affected personnel to another position on the post establishment of the responsible department or another department. Affected personnel could be employed in a post of a lower grading with the retention of current level of remuneration and conditions of service. The redeployment of such personnel should be weighed against the cost effectiveness of employment and utilising of staff against a lower graded post. If it is found not to be cost effective, such personnel should be declared in excess of operational requirement (supernumerary) and be dealt with in terms of paragraph (e) below.
- (b) Personnel who are 55 years and older should be alerted to section 16(2A)(a) of the PSA, in terms of which an employee has the right to retire from the Public Service on the date on which he or she attains the age of 55 years, or a later date.
- (c) An employee who has reached the age of 60 years, may in terms of 16(4) of the PSA be retired from the Public Service, subject in every case to the approval of the relevant executive authority.
- (d) Personnel who are near the compulsory retirement age could also be seconded to the PE for a stated period (a period of up to 5 years is suggested) until they retire. Departments could themselves determine the period of secondment.

- (e) Continued employment of affected personnel in excess of operational requirement (supernumerary). This category of personnel should be treated in terms of the prevailing policy and collective agreements regarding redundancy management in the Public Service.

## **5.5 Withdrawals from the Government Employees Pension Fund (GEPF)**

The MoF (with the concurrence of the Board of Trustees of the GEPF) must approve the financial arrangements regarding the transfer of liabilities and assets from the GEPF to a separate fund.

Withdrawals from the GEPF must take place within the statutory requirements for withdrawal and the requirements, rules and procedures for withdrawing from the GEPF as discussed below.

### **(a) Statutory Requirements for Withdrawal**

Section 32 of the Government Employees Pension Act, 1996 (Proclamation No. 21 of 1996) and Rule 21 of the Rules of the Fund, deal with the withdrawal of participating employers, public service sectors or part of sectors from the GEPF. The relevant provisions set the requirements to be met for such an employer to withdraw from the Fund and set certain procedures. The same requirements and procedures apply for the withdrawal of a part of the public service and in the event of the commercialisation/privatisation of bodies or institutions. For ease of reference, the relevant provisions are repeated here:

- “32. (1) This Act shall not preclude the establishment by an Act of Parliament of a separate fund for a sector or part of a sector of the public service as contemplated in section 8(1)(a) of the Public Service Act, 1994. (Proclamation 103 of 1994).
- (2) Subject to the Constitution of the Republic of South Africa, 1993 (Act No. 200 of 1993) the creation of such a separate fund shall be subject to agreement between the employer and the employee organisations representing such a sector or part of a sector of the Public Service after negotiations in accordance with the labour relation laws or other arrangements applying to such a sector.
- (3) Appropriate financial arrangements regarding the transfer of liabilities and assets from the Fund to such a separate fund referred to in subsection (2) shall be approved by the Minister with the concurrence of the Board: Provided that such arrangements shall not have a detrimental effect on the financial position of the Fund.
- (4) This Law shall not prohibit the South African Police Service from providing for pensions for its former members by an Act of Parliament in accordance with section 214(2)(b)(iv) of the Constitution of the Republic of South Africa, 1993 (Act No 200 of 1993).”

Rule 21:

“21.1 An institution or body referred to in paragraph (a) and (c) of the definition of employer in section 1 of the Law or part of such an institution, body or function, which has members of the Fund in its service may, after negotiation and agreement, subject to a notice period of three months (or such shorter period as the Board approves) request the Board to cease participating in the Fund as regards membership of the Fund of members in its service or a part thereof subject to the provisions of the Law with specific reference to section 32 of the Law, in which case the Board deals with the appropriate part of the market value of the assets of the Fund which relate to such members on a basis decided by the Board acting on the advice of the actuary in terms of the wishes of such an institution or body or such part of such an institution or body and the affected members: Provided that the value of each member’s interest will not exceed the funded position of such member’s accrued interest in the Fund, based on market values, as determined by the actuary.

21.2 The provisions of rule 21.1 shall apply *mutatis mutandis* in the event of an action of commercialisation, privatisation or similar action pertaining to an institution, body, part or function thereof as contemplated in rule 21.1.”

**(b) Requirements, Rules and Procedures for withdrawing from the GEPF**

To withdraw from the GEPF, withdrawing entities must provide clear evidence that they have complied with all the provisions of the quoted Section 32 and Rule 21 above. Withdrawals are thus subject to the following requirements/rules and procedures:

- An Act of Parliament that provides for the establishment of a separate fund.
- A collective agreement between the employer and employee organisations representing the withdrawing sector or body. In view of section 36 of the Labour Relations Act, 1995, the National Treasury maintains that such collective agreements must be reached in the Public Service Co-ordinating Bargaining Council as opposed to dealing with it on sectoral/departmental level.
- Approval by the Minister of Finance (with the concurrence of the Board of Trustees of the GEPF) for the financial arrangements regarding the transfer of liabilities and assets from the GEPF to a separate fund. These arrangements may not have a detrimental effect on the financial position of the GEPF.
- The value of each member’s transfer benefit will not exceed the funded position of such member’s accrued interest in the Fund, based on market values as determined by the actuary of the GEPF. This may result in a lower funding level than the actuarial funding level expressed in the three yearly actuarial evaluation. (E.g. if a member’s actuarial interest is R 100 000 while, based on market values, only 94% of the actuarial interest is funded, only 94% of R 100 000 will be transferred.)
- A three-month notice period.

The Minister of Finance supplemented the above requirements with the following:

- The unfunded liability of the accrued interest becomes the responsibility of the new separate pension fund or new employer. No additional money will be appropriated for the unfunded liability and no further liability vests in the State.
- The total membership related to the withdrawing sector or body (contributing members and pensioners) should be eligible to join the new fund. Should the pensioners remain in the GEPF, the fund will be burdened with the liability while the active membership is reduced, impacting negatively on both the Fund's cash flow and financial position.
- Clear evidence must be provided that the employer adequately informed all persons withdrawing from the GEPF on the full implications of the withdrawal and afforded them all options according to rules and regulations of the GEPF Law. These include the following:
  - To remain members of the GEPF in terms of Rule 5.2.5 (allowing for the continued payment of employer's contributions to the Fund) read with the definition of employer in section 1. According to these provisions, the Board of Trustees of the GEPF may recognise any new employer (where there is privatisation/commercialisation) as a participating employer in the Fund.
  - To elect dormant membership and to join the new fund from a current date.

Withdrawing members should also be informed of the following:

- In terms of the Income Tax Act, 1962, two-thirds of any amount transferred from the GEPF to a provident fund will be taxed.
- The benefit structure of the GEPF is approximately 30% better than can be offered in private sector arrangements, due to the provision of an annuity in addition to a gratuity. Especially for older members, withdrawing from the GEPF may be detrimental if these benefits are not matched in a new fund.

## **5.6 Post retirement medical assistance liability**

The post retirement medical assistance liability of the State as employer is unfunded at present. This will become a liability of the new employer and must be declared up-front.

## **6. CONCLUSION**

This guide is the product of the much appreciated inputs, shared experiences and consultation with a wide audience both inside and outside the public sector. Departments should use the guide when considering agencification strategies for service delivery improvement and to enhance access to services.

The guide is intended to be a living document, which will be updated with policy developments, agreements and frameworks that impacts on PEs as well as the best practice experiences of departments. The guide will also be published on the internet site of the Department of Public Service and Administration (<http://www.dpsa.gov.za/>)

Departments are invited to share their best practice experiences and are welcome to request further information and assistance when applying the guide. The DPSA's/NT's contact particulars are as follows:

Director-General: Public Service and Administration  
Attention: Senior Manager: Government Internal Consulting Service  
Department of Public Service and Administration  
Private Bag X916  
PRETORIA  
0001

Telephone Number: (012) 314 7177  
Fax Number: (012) 314 7076  
Email: [etienne@dpsa.gov.za](mailto:etienne@dpsa.gov.za)

Internet address <http://www.dpsa.gov.za/>

and

Director-General: National Treasury  
Attention: DDG: Asset and Liability Management  
Private Bag X 115  
PRETORIA  
0001

Telephone Number: (012) 315 5758  
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Email: [Higgo.duToit@treasury.gov.za](mailto:Higgo.duToit@treasury.gov.za)

## CABINET APPROVED BROAD PROCESS FOR CREATING PUBLIC ENTITIES (PEs) AT THE NATIONAL SPHERE OF GOVERNMENT

### Step 1: Preparing a business case.

Executive authorities are required to prepare a business case that involves:

1.1 Strategic assessment of the particular service to determine, *inter alia*, -

- its functional location;
- other possible options for service delivery; and
- applicability to generic and type-specific criteria.

Such an assessment should demonstrate the advantages of agencification over other models of service delivery and that the broader interests of the state are best served by this option.

1.2 A feasibility study, which provides for qualitative reasons and benefits.

1.3 A costing study which should consider -

- financial viability and value for money;
- affordability; and
- the ability to generate own income and other sources of income (user pay levies), partnership contributions and government transfer payments.

1.4 Specifying minimum service standards for core services/ objectives.

1.5 Human resource management and work organisation issues.

1.6 Recommending the appropriate service delivery business model.

### Step 2: Assessing the business case:

In order for the MPSA and MoF to coherently exercise their legislative competencies (MPSA to transfer a public service function to a PE and MoF to consent in writing to the establishment of a PE), a joint evaluation panel should be set up between the respective two ministries, to assess the relevant business case for an intended national PE.

### Step 3: Formalising the establishment of a PE:

National executive authorities are required to inform the relevant portfolio committee and Cabinet of the consent to the establishment of a PE by the MoF and MPSA before Cabinet approves that legislation on the establishment of the PE be introduced in Parliament.

### Step 4: Implement the establishment of a PE:

Executive authorities are required to implement the establishment of a PE and effect the transfer of a public service function to the PE.

## PROCESS TO CREATE PUBLIC ENTITIES (PEs) AT THE NATIONAL SPHERE OF GOVERNMENT

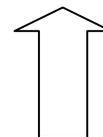
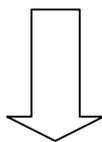
### STEP 1 - EXECUTIVE AUTHORITY PREPARE BUSINESS CASE

1. Conduct a strategic assessment of the service.
2. Compiling strategic plans & budget projection.
3. Identify and assess service delivery options by
  - questioning selected strategic focus areas; and
  - narrowing down alternatives.
4. Attend to governance issues.
5. Recommend the appropriate service delivery option.

### STEP 4 - IMPLEMENT THE ESTABLISHMENT OF A PUBLIC ENTITY

An executive authority must:

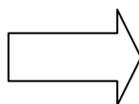
- Approve the initial organisation and post establishment for the PE.
- Appoint the members of the controlling body.
- Effect the transfer of the function and concomitant resources to the PE.



### STEP 2 - ASSESSING THE BUSINESS CASE

Joint evaluation panel between the MPSA and MoF to assess the business case for an intended PEs. to:

- Determine the level of the CEO post.
- Evaluate the level of positions of board members.
- Coherently exercise legislative competencies.
- MPSA and MoF consent in writing to establishment of PE.



### STEP 3 - FORMALISE THE ESTABLISHMENT OF A PE

An executive authority must:

- Submit the necessary motivation and consent of the MPSA and MoF to the relevant portfolio committee for discussion.
- Inform Cabinet of the consent of the MPSA and MoF panel.
- Request Cabinet to introduce a Bill in Parliament for establishing the PE.
- Table a Bill in Parliament for establishing PE.

## BROAD CATEGORIES OF RISKS AND THEIR DEFINITIONS

**Availability risk.** The risk that the quantum of the service provided is less than required under the contract.

**Construction risk.** The risk that the construction of the physical assets is not completed on time, to budget and to specification.

**Decant risk.** The risk arising in accommodation projects relating to the need to decant staff/clients from one site to another.

**Demand risk.** The risk that demand for the service does not match the levels planned, projected or assumed. As the demand for a service may be (partially) controllable by the government, the risk to the public sector may be less than that perceived by the private sector.

**Design risk.** The risk that the design cannot deliver the services at the required performance or quality standards.

**Inflation risk.** The risk that actual inflation differs from assumed inflation rates.

**Legislative risk.** The risk that changes in legislation increases costs. This can be sub-divided into general risks such as changes in corporate tax rates and specific ones that may discriminate against PPP projects.

**Maintenance risk.** The risk that the costs of keeping the assets in good condition vary from budget.

**Occupancy risk.** The risk that a property will remain untenanted -a form of demand risk.

**Operational risk.** The risk that operating costs vary from budget, that performance standards slips or that the service cannot be provided.

**Residual value risk.** The risk relating to the uncertainty of the value of physical assets at the end of the contract.

**Planning risk.** The risk that the implementation of a project fails to adhere to the terms of planning permission, or that detailed planning cannot be obtained, or, if obtained, can only be implemented at costs greater than in the original budget.

**Policy risk.** The risk of changes of policy direction not involving legislation.

**Technology risk.** The risk that changes in technology result in services being provided using non-optimal technology.

**Volume Risk.** The risk that actual usage of the service varies from the level forecast.

## ANNEXURE D

### GUIDELINES FOR THE DRAFTING OF A PE ENABLING BILL

When drafting an enabling Bill for a PE, the following elements should be incorporated in the Bill as far as possible:

1. Interpretation, Object and Application – Include definitions, objectives of act and reference to institutions to which the act applies.
2. Establishment of a PE – Provide for its legal status and locating the PE within the appropriate level of government.
3. Objectives of PE.
4. Application of the Companies Act to a PE.
5. Functions:
  - (a) Functions of Accounting Authority - Allocate powers and functions including the administration of specific laws to the PE.
  - (b) Performance Agreement – Entered into between the executive authority and the PE relating to scope of business, efficiency, financial performance, achievement of objectives, business planning, financial soundness and other performance matters.
  - (c) Ministerial Instruction – Executive authority instructs PE in writing and after consultation on issues to do or not to do.
6. General Management:
  - (a) Composition of the controlling body and allocate powers and functions to that body/positions. Constitute the controlling body's procedures. Indicate disqualifications of members in terms of set criteria.
  - (b) Period and conditions of Office – Including are issues relating to expiry of term of office, re-appointment, conditions for vacating positions, and disclosure of interest.
7. Remuneration Matters:
  - (a) Remuneration of members appointed to the controlling body.
  - (b) Chief Executive Officer – Provide for the appointment, responsibilities, assignment of powers and functions to the CEO, remuneration and conditions of service, and disclosure of interests.
  - (c) Staff of PE – Provide for the appointment, remuneration, conditions of service, personnel practices and regulations of personnel including the provision for the

employment or secondment of personnel from the public service or the transfer of public servants to the entity.

- (d) Board members and staff of a PE should be remunerated (including conditions of service) in terms of a remuneration system approved by the Minister responsible for the PE in consultation with the Minister of Finance.

#### 8. Financial Matters:

- (a) Handing over of assets and liabilities – Provide for the transfer of assets, liabilities, rights and obligations to the PE. Contacting arrangements, stamp duties, transfer duties or registration fees.
- (b) Borrowing powers which is not in conflict with Chapter 8 of the PFMA.
- (c) Accounting authority - Provide for accountability in accordance with Section 49 of the PFMA.
- (d) Financial year - The financial of a PE is from 1 April in any year to 31 March of the following year, but the first financial year is from the date of coming into operation of its Act to 31 March of the following year.
- (e) Business and Financial Plans and arrangements which provide for accountability and financial systems and reporting mechanisms are covered by the PFMA and can be excluded in from the draft Bill.
- (f) Annual report and financial state of affairs which provide for arrangements covering balance sheet, income statement, cash flow statement and audit arrangements as well as publication and tabling of annual report are covered by the PFMA and can be excluded from the draft Bill.
- (g) Accountability and dissolution of a PE.
- (h) Business agreement between a PE and responsible Department if the PE renders a service to the Department.
- (i) Tax liability.
- (j) Sources of funding of the PE.

#### 9. General Matters:

- (a) Restrictions on use of name;
- (b) Limitation of liability;
- (c) Failure of Authority to comply with provisions – Provide also for complaints procedure;

- (d) Legal rights;
- (e) Regulations – Executive authority make regulations;
- (f) Interim arrangements;
- (g) Amendment of laws;
- (h) Transitional provisions;
- (i) Closing down of the PE; and
- (j) Short title and commencement.

The following are examples of Acts for establishing PEs:

- National Research Foundation, Act No. 23 of 1998.
- Chapter II of the Nuclear Energy Act No. 46 of 1999 (South African Nuclear Energy Corporation, Limited).
- Independent Communications Authority of South Africa, Act No. 13 of 2000.