

**REPUBLIC OF NAMIBIA**

**PARLIAMENT**

**NAMIBIA ENERGY  
REGULATORY AUTHORITY  
BILL**

**[Bill No. -2017]**

## **BILL**

To establish a single national energy regulator, the Namibia Energy Regulatory Authority, which will be responsible to regulate electricity, downstream gas including gas pipelines and storage facilities, downstream petroleum pipelines and storage facilities, renewable energy, energy efficiency and energy conservation; to provide for its functions and duties; and to provide for incidental matters.

**BE IT ENACTED** by the Parliament of the Republic of Namibia, as follows:

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## **PART I PRELIMINARY**

### **Definitions**

1. In this Act, unless the context indicates otherwise –

“Authority” means the Namibia Energy Regulatory Authority established by section 3;

“Board” means the board of the Authority as established by section 4;

“Chief Executive Officer” means the Chief Executive Officer of the Authority appointed under section 13;

“committee” means a committee established under section 10;

“energy sector” means an energy sector falling within the regulatory scope of the Authority as contemplated in section 2;

“energy source” includes, without limiting the generality thereof, any petroleum product, electricity, natural gas or liquefied natural gas, solar energy, hydropower or windpower, nuclear energy, geothermal energy, biogas, biomass or any other energy source within an energy sector;

“energy sector specific legislation” means any law which has as its object the regulation of an energy sector by the Authority as contemplated in section 2;

“financial year” means the financial year of the Authority referred to in section 20;

“High Court” means the High Court of Namibia as defined in section 1 of the High Court Act, 1990 (Act No. 16 of 1990);

“inspector” means a person appointed as an inspector under section 14;

“licence” includes any permit, certificate, right, grant or other authorisation granted to a person authorising such person to undertake an activity regulated under energy sector specific legislation and “licensee” and “licensing” have corresponding meanings;

“member” means a member of the Board appointed under section 4;

“Minister” means the Minister responsible for energy;

“prescribed” means prescribed under this Act by regulation, rule or notice;

“Public Enterprises Governance Act” means the Public Enterprises Governance Act, 2006 (Act No. 2 of 2006);

“regulation” means a regulation made under section 40;

“repealed Act” means the Electricity Act, 2007 (Act No. 4 of 2007);

“rule” means a rule of the Tribunal made under section 32(6) or 34(1) or a rule of the Authority made under this Act, as the case may be;

“this Act” includes the rules and regulations;

“Tribunal” means the Energy Tribunal to be established under section 30.

### **Application and scope**

2. The Authority, through energy sector specific legislation which specifically grants such regulatory oversight to the Authority, must regulate –

- (a) electricity;
- (b) downstream gas including, but not limited to, transmission by gas pipelines and storage facilities;
- (c) downstream petroleum transmission pipelines including, but not limited to, storage facilities;
- (d) renewable energy, and energy efficiency and energy conservation, and
- (e) any such other energy sector as may be assigned to the Authority under any other law.

## **PART II NAMIBIA ENERGY REGULATORY AUTHORITY**

### **Establishment of Namibia Energy Regulatory Authority**

3. (1) The Namibia Energy Regulatory Authority is hereby established as a juristic person and will, subject to energy sector specific legislation, be an independent regulator of energy sectors.

(2) The Authority is specifically authorised to a be member of a company subject thereto that –

- (a) the written approval of the Minister is obtained prior to the Authority becoming a member;
- (b) such membership assists or benefits the Authority in the performance of its functions; and
- (c) such company does not fall under the regulatory authority of the Authority in terms of any energy sector specific legislation.

(3) (a) As a juristic person, and in order to achieve its objects, the powers of the Authority include, but are not limited to, the following powers:

- (i) To acquire movable and immovable property and to deal with such property in the manner that it thinks fit, subject thereto that the Authority may only acquire, alienate or mortgage immovable property with the prior written approval of the Minister;
- (ii) to conclude any contract;

- (iii) to institute and defend legal proceedings in its own name.
- (b) Paragraph (a)(i) applies with the necessary changes to immovable property acquired in the name of a company of which the Authority is a member as contemplated in subsection (2).

### **Board and Board composition**

4. (1) There shall be a board of the Authority which, subject to this Act, must manage and control the affairs of the Authority and exercise the powers conferred and perform the duties imposed upon the Authority by this Act or any energy sector specific legislation.

(2) The Board consists of five members who, subject to subsection (3), must be appointed by the Minister from amongst persons who have appropriate expertise and experience in one or more of the following, namely, the electricity industry, law, economics or environmental issues, in accordance with section 15 of the Public Enterprises Governance Act.

(3) A person may not be appointed as a member of the Board, if he or she –

- (a) is not a citizen of Namibia or holder of a permanent residence permit;
- (b) is an unrehabilitated insolvent;
- (c) has been convicted of an offence, other than a political offence committed before the date of Namibia's independence, for which that person has been sentenced to imprisonment without the option of a fine for a period of 12 months or more;
- (d) is an office bearer of a political party;
- (e) is a person that has been declared by a competent court to be of unsound mind or mentally unfit;
- (f) is a licensee or, in the event of a licensee being a body corporate, is a member or has a similar ownership or interest in a licensee or is in the employment of a person to whom a licence has been granted by the Authority under any energy sector specific legislation.

(4) The Minister appoints the Chairperson and Vice-Chairperson of the Board from amongst the members of the Board subject thereto that the Chief Executive Officer may not be appointed as the Chairperson or the Vice-Chairperson.

### **Term of office**

5. (1) Subject to section 6, a member holds office for a term of not longer than five years, and is eligible for reappointment at the end of that term.

(2) The Chief Executive Officer's term of office as an *ex officio* executive member coincides with the term of office of the Chief Executive Officer as provided for in section 13(3)(b).

#### **Vacation of office and filling of vacancies**

6. (1) The office of a member becomes vacant if he or she –
- (a) becomes subject to a disqualification mentioned in section 4(3);
  - (b) is absent from three consecutive meetings of the Board without the permission of the Board;
  - (c) resigns by notice in writing to the Minister;
  - (d) dies;
  - (e) is removed from office under subsection (2).

(2) The Minister may remove a member from office if, after affording the member an opportunity to be heard, the Minister is satisfied that the member –

- (a) is incapacitated by physical or mental illness or other cause or incapacity;
- (b) is convicted for corruption or other criminal charges; or
- (c) materially fails to perform his or her functions under the Act or is for any other valid reason unable or unfit to effectively or efficiently discharge his or her functions.

(3) If a member dies or his or her office is vacated before the expiration of his or her term of office, the Minister must appoint a suitable person to fill the vacancy for the remaining portion of that member's term of office.

#### **Remuneration of members**

7. (1) Subject to section 22(1) of the Public Enterprises Governance Act, a member must be paid from the funds of the Authority such remuneration and allowances as the Minister determines.

(2) The Authority may reimburse a member or a member of a committee for expenses reasonably incurred by such member in the exercise of his or her functions under this Act.

## Meetings of Board

8. (1) The Chairperson of the Board must convene its first meeting and thereafter, subject to subsection (2), the meetings must be held at such times and places as the Board may determine, but at least four meetings must be held every year.

(2) The Chairperson may at any time, and must if so requested in writing by the Minister, the CEO or by at least three members convene a special meeting of the Board.

(3) The majority of the members form a quorum at a meeting of the Board.

(4) The Chairperson or, in his or her absence, the Vice-Chairperson, presides at a meeting of the Board and, failing both, such other member as the members present may elect amongst their number.

(5) A decision of the majority of the members present at a meeting of the Board constitutes a decision of the Board and, in the event of an equality of votes, the person presiding at the meeting has a casting vote in addition to a deliberative vote.

(6) The Board may invite any person, whose presence is in its opinion both desirable and expedient, to attend and participate in the deliberations of a meeting of the Board but such person shall have no right to vote.

(7) The Board must cause proper minutes to be kept of proceedings at its meetings.

(9) All meetings of the Board and its committees are open to the public, unless the Chairperson of the Board or committee, as the case may be, in cases where he or she deems it justifiable and having given reasons therefor to persons present, orders the public to withdraw from the meeting for the duration of the discussion of a particular matter or matters on the agenda.

(10) The Board may, whether by means of rules or internal procedures, determine the manner in which notice of meetings to be held and the business to be conducted thereat including resolutions taken (except those taken at a meeting not open to the public) is brought to the attention of the public.

(11) Despite anything to the contrary in this section, the Authority need not hold a meeting if the members agree thereto in writing, and in such event –

- (a) a decision in writing dealing with a matter to be dealt at such a meeting and signed by the requisite majority of members is deemed to be a decision taken by the Authority and held in terms of this section on the date on which the last signature to such decision is affixed;

- (b) a decision contemplated in paragraph (a) must be minuted at the first meeting of the board held subsequent to such a decision being taken; and
- (c) a member must in writing disclose his or her interest, as anticipated in section 37, in such a decision and in the event where a member has declared an interest in the matter to which the decision relates such member may not vote on such matter as anticipated in this subsection.

### **Requirements for decisions of Board**

**9.** Decisions of the Board must be in writing and must comply with Article 18 of the Namibian Constitution.

### **Committees**

**10.** (1) The Board may, from amongst its members, establish any committee –

- (a) to advise the Board on any matter concerning the functions of the Board as the Board may determine; or
- (b) to perform such functions of the Board as the Board may assign to the committee.

(2) A committee may invite any person whose presence is, in its opinion, both desirable and expedient to attend and to participate in the deliberations of a meeting of the committee but such person does not have the right to vote.

(3) The Board may dissolve or reconstitute a committee at any time.

(4) The Board must designate a member of a committee as the chairperson of the committee.

(6) The Board is not divested or relieved from a function entrusted to a committee and retains ultimate responsibility and accountability for the proper performance of its functions.

### **Functions of Authority**

**11.** (1) The functions of the Authority are:

- (a) To exercise regulatory supervision, in terms of energy sector specific legislation, over the energy sectors in a transparent and an independent, accountable and efficient manner;

- (b) to administer a licencing or similar system and to regulate tariffs and other charges as allocated to the Authority in accordance with the provisions of energy sector specific legislation;
- (c) to promote diverse energy sources and access to energy sources in Namibia;
- (d) as applicable to make, review, and enforce compliance with this Act, the regulations and the rules;
- (e) to promote the efficient functioning and development of the energy sectors and security of supply in accordance with energy sector specific legislation including, if so granted to the Authority under energy sector specific legislation, the power to make rules;
- (f) to promote private sector investment in the energy sectors in accordance with prevailing Government policy;
- (g) to advise the Minister on any matter relating to energy and for this purpose the Authority may carry out such investigations as it or the Minister may deem necessary.

### **Resolution of disputes by Authority**

**12.** (1) Subject to any provision to the contrary in energy sector specific legislation, the Authority must, in relation to any dispute arising out of the application of this Act or energy sector specific legislation –

- (a) act as mediator if so requested by the parties to the dispute; or
- (b) in the event where the Authority does not act as mediator for whatever reason, endeavour to resolve the dispute by such means and on such terms as the Authority thinks fit.

(2) The Authority may appoint a suitable person to act as mediator on its behalf and any act or decision of a person so appointed is deemed to be an act by or decision of the Authority subject thereto that, if the Authority is a party to a dispute being mediated, the Authority may not mediate such dispute but must appoint a suitably qualified and an independent third party as mediator.

(3) Without derogating from the power of the Authority to make enforceable decisions under any provision of this Act or under any energy specific legislation, the outcome of a mediation or resolution of a dispute in terms of this section is not legally binding unless the parties involved in writing agreed otherwise.

(4) The main objective of a mediation under this Act or any energy sector specific legislation is to attempt, through mediation, to facilitate the

resolution of a dispute in a just, speedy, efficient and cost effective manner through the settlement thereof by agreement between the parties involved.

(5) The Authority may, after consultation with the Minister, by notice in the Gazette make mediation rules with regard to -

- (a) the procedures to be followed in a mediation;
- (b) administrative fees to be paid for the benefit of the funds of the Authority with regard to a mediation by the parties involved and different fees may be determined for the different mediation procedures involved;
- (c) the manner in which a dispute is to be referred for mediation, the manner in which a mediation is to be conducted and the time frames applicable thereto;
- (d) the rights, duties and obligations of the Authority, mediator (whether the Authority or another person as contemplated in subsection (2)) and of the parties involved in a dispute with regard to a mediation;
- (e) the manner in which a party may be represented in a mediation;
- (f) in the event of a mediator being appointed as anticipated in subsection (2), the procedures for the nomination and appointment of a mediator and the qualifications or experience required for a person to be appointed as a mediator;
- (g) the entering into mediation and settlement agreements and the contents thereof;
- (h) the confidentiality and privilege attaching to disclosures made at or during a mediation and the admissibility or inadmissibility thereof as evidence in any subsequent or other legal or dispute resolution proceedings;
- (i) the requirements for, and the format and contents of, documents, statements, pleas, claims, affidavits and any other relevant information pertaining to a mediation;
- (j) the suspension of time limits prescribed under the mediation rules;
- (k) any other matter relating to mediation which, in the opinion of the Authority, is necessary or expedient to achieve or promote the objectives of mediation.

(6) (a) The mediation rules contemplated in subsection (5) must attach time frames to the mediation procedures prescribed to ensure that a mediation is dispensed within a reasonable period after the dispute was submitted for

mediation provided that the parties to the dispute may agree to an extension for settling the dispute.

(b) Unless the parties to the dispute agreed to an extension, if a dispute is not settled within a period prescribed in the mediation rules after the dispute was submitted for mediation, a party may thereafter refer the matter to the Tribunal or, in the event of the Tribunal not having been established, a civil court of competent jurisdiction, as the case may be.

(7) A mediation under this Act or any energy sector specific legislation does not affect the laying of criminal charges against a person who commits an offence under this Act or any energy sector specific legislation.

### **Chief Executive Officer and other personnel**

13. (1) The Board must, upon such terms and conditions as the Board may decide, appoint a suitably qualified person to be the Chief Executive Officer of the Authority subject thereto that the Board must, prior to such appointment, consult with the Minister as regards the candidate for appointment and the proposed terms and conditions of such candidate's appointment.

(2) The Chief Executive Officer, in accordance with the policies and directions of the Board, is responsible for the day-to-day management and administration of the Authority.

(3) The Chief Executive Officer –

- (a) is an *ex officio* executive, non-voting member of the Board, additional to the members appointed under section 4(2), and, unless specifically stated otherwise in this Act, has the same rights, powers, functions and duties as any other member of the Board;
- (b) holds office for a term of five years and is eligible for reappointment at the end of that term;
- (c) is responsible for the carrying out of the decisions of the Board;
- (d) keeps the books and proper records of the affairs and proceedings of the Authority to ensure –
  - (i) the efficient administration of the Authority; and
  - (ii) the general direction and control of other employees of the Authority;
- (e) may, subject to the directions of the Board, appoint such employees as are necessary to enable the Authority to properly carry out its functions;

- (f) is responsible for the proper and diligent implementation of, and compliance with, the Public Enterprises Governance Act.

(4) The Chief Executive Officer, subject to the policies and directions of the Board and to section 22(3) of the Public Enterprises Governance Act, determines the conditions of service, remuneration and other benefits of the personnel of the Authority.

(5) Whenever the office of the Chief Executive Officer is vacant, or the Chief Executive Officer is for any reason unable to perform the functions of the office, the Board may appoint –

- (a) a staff member of the Authority; or
- (b) any other suitable person,

to act as Chief Executive Officer during the vacancy or during the period that the Chief Executive Officer is unable to perform those functions subject thereto that the Board may delegate the function of appointing an acting chief executive officer to the Chief Executive Officer.

### **Inspectors**

**14.** (1) For the purposes of conducting investigations, the Chief Executive Officer may appoint if and when considered necessary -

- (a) such employees of the Authority;
- (b) subject to subsection (2), such other persons in the employment of the public or private sector,

as are reasonably qualified to be inspectors.

(2) Before appointing a person who is an employee of the State or an employee of a statutory body or institution as an inspector, the Chief Executive Officer must consult and negotiate with the Minister responsible for the Ministry where the employee of the State is employed, or the person in charge of the statutory body or institution where the employee is employed, as the case may be, to obtain consent for, and agree upon the conditions of, any such appointment.

(3) The Authority must issue an identity card to an inspector which must contain a recent photograph of the inspector and a telephone number where the Authority may be contacted to verify the identity or powers and functions of the inspector.

- (4) An inspector must -
  - (a) carry the identity card at all times when exercising powers or performing functions as an inspector; and

- (b) produce the identity card for inspection if so required by a person in relation to whom the inspector seeks to exercise any power or perform any function.
- (5) An inspector -
  - (a) has such powers, functions and duties as may be provided for by this Act or by any energy sector specific legislation or as may be delegated or assigned to the inspector concerned by the Authority;
  - (b) must exercise such powers, perform such functions and discharge such duties in compliance with the directions and instructions as may be specified orally or in writing by the Authority.

### **General powers of inspectors**

**15.** (1) An inspector has the power to demand on behalf of the Authority any information from any person which that person is required to provide to the Authority by virtue of any provision of this Act or any energy sector specific legislation.

(2) Subject to section 43, an inspector may enter any premises and put any question to any person, or may examine any book, document, energy-related facility, any energy-related equipment or any other item or thing, in order to obtain any information required by the Authority for the purpose of performing any function under this Act or any energy sector specific legislation.

### **Keeping of information and access thereto**

**16.** (1) The Authority must ensure the proper organisation and maintenance of information and records in its custody in a manner which, subject to energy sector specific legislation, facilitates access to such information and records.

(2) As regards the preservation of and access to information and records contemplated in subsection (1), the Authority may, whether by means of rules or internal procedures, determine –

- (a) the type of and manner in which information and records must be kept, preserved and protected by it as well as applicable time frames for which such information and records must be kept;
- (b) subject to confidentiality requirements in applicable laws, access by persons and the public to such information and records and the manner in which such access may be exercised including the payment of fees for access to, and copies of, information and records;

- (c) the manner in which to protect, and procedures for the protection of, confidential information and records in its custody or under its control including the manner in which such confidentiality must be communicated to interested persons and the public and the grounds for classifying information as confidential;
- (d) any other matter relating to such information and records which in the opinion of the Authority is necessary or expedient.

### **Appeals, and reference of disputes, to Tribunal**

**17.** (1) In the event of a Tribunal having been established as anticipated in Part IV of this Act -

- (a) a person who is affected by an act or a decision of the Authority under this Act or any energy specific legislation, who is dissatisfied with the act or decision and who wishes to appeal against such act or decision; or
- (b) a party to a dispute under this Act or any energy sector specific legislation whether such dispute is between licensees, between a licensee and a customer or a prospective customer, between the Authority and any person or between persons affected by the application of this Act or energy sector specific legislation and who wishes to refer such dispute for determination,

must, within the period and in the manner and upon payment of the fees prescribed by the Minister appeal against the decision, or refer the dispute, to the Tribunal unless application needs to be made for urgent interim relief.

(2) A person contemplated in subsection (1) may obtain interim relief on an urgent basis from the High Court pending an appeal or reference to, or the outcome of an appeal or reference to, the Tribunal.

(3) An appeal or reference to the Tribunal under this Act or any energy sector specific legislation suspends any right, except with regard to urgent interim relief, to commence an action in a civil court with respect to the same matter.

(4) In the event of a Tribunal not having been established as anticipated in Part IV of this Act, an appeal or reference of a dispute contemplated in subsection (1) must be submitted to a civil court of competent jurisdiction.

## **PART III FINANCIAL PROVISIONS**

### **Funds of Authority**

- 18.** (1) The funds of the Authority consist of the following:

- (a) Money which may be appropriated to the Authority by Parliament from time to time;
  - (b) fees and other monies payable to the Authority under any relevant energy sector specific legislation;
  - (c) money collected in respect of levies imposed under section 19;
  - (d) any revenue received for services provided in the course of its activities;
  - (e) fines and penalties, other than fines or penalties imposed through the criminal justice system with regard to offences committed, and other monetary sanctions imposed by the Authority in accordance with this Act or any energy sector specific legislation;
  - (f) money raised by way of loans with the approval of the Minister and the concurrence of the Minister responsible for finance;
  - (g) interest on investments;
  - (h) donations or grants made to the Authority; and
  - (i) any money to which the Authority is or may become entitled.
- (2) The Authority may, subject to the Public Enterprises Governance Act, invest any portion of its funds not immediately required by it.
- (3) All expenses incidental to the performance of the functions, powers and duties of the Authority must be defrayed from the funds of the Authority.

## **Levies**

**19.** (1) Subject to subsection (8), the Authority, after consultation with the Minister, may by notice in the Gazette impose a levy, for the benefit of the funds of the Authority in order to defray all the expenses incidental to the performance of functions, powers and duties of the Authority as anticipated in section 18(3), on any energy source of an energy sector which is manufactured, produced, generated, transmitted, distributed, stored, transported, supplied, provided, consumed or sold at any point or other manner in Namibia, or which is imported into or exported from Namibia.

(2) A levy imposed under subsection (1) may differ according to the purpose for which the energy source in question is used or the place where, or method by which, such energy source is manufactured, produced, generated, transmitted, distributed, stored, transported, supplied, provided, consumed, sold, imported or exported.

(3) The levy imposed on an energy source as contemplated in subsection (1) may specify that it is simultaneously imposed upon one or more of the following persons:

- (a) Consumers of such energy source;
- (b) service providers of such energy source;
- (c) customers or other clients of service providers of such energy source;  
or
- (d) any other users of such energy source.

(4) A notice referred to in subsection (1) may impose the levy in one or more of the following forms:

- (a) A percentage of the income of the relevant service provider of an energy source (whether such income is derived from the whole business or a prescribed part of such business) as specified in the notice;
- (b) as a percentage of the profit of the relevant service provider of an energy source (whether in respect of the whole business or in respect of a prescribed portion of such business), calculated in the manner set out in the notice;
- (c) a fixed amount per year in respect of the relevant energy services provided by the service provider of an energy source as specified in the notice;
- (d) a fixed or a percentage amount in respect of the units or quantities of energy manufactured, produced, generated, transmitted, distributed, stored, transported, supplied, provided, consumed, sold, imported or exported from the relevant energy source; or
- (e) in any other manner that is not unreasonably discriminatory.

(5) A notice referred to in subsection (1) –

- (a) must state –
  - (i) the amount, percentage or rate of the levy or the basis or method of calculation or determination of the levy;
  - (ii) when the levy becomes effective and the date on which or the periods within which the levy is payable and the manner of payment;

- (iii) the person who is liable for the payment thereof and, in the event where the levy notice authorises the passing on of the levy to subsequent customers, the manner in which the levy may so be passed on and reflected on the invoices of such subsequent customers including the liability of such subsequent customers to pay such passed on levy to the person liable for payment thereof;
  - (iv) the energy source in respect of which the levy is payable;
  - (v) if applicable, the person who is responsible for the collection thereof and the subsequent payment thereof by such collecting person to the Authority; and
  - (vi) the times when, the manner in which, and the person to whom the levy must be paid;
- (b) may state, in the event of there being administrative cost involved in such collection, the manner in which such cost may be recovered, including the amount or rate at which it may be recovered, but provided that such amount or rate must be cost-reflective;
  - (c) may state the circumstances, whether specific or general, and the manner in which exemption from the payment of any levy imposed under subsection (1) may be granted which exemption may also be granted retrospectively;
  - (d) may state, with regard to the person liable for payment thereof as anticipated in paragraph (a)(iii) or the person responsible for the collection thereof as anticipated in paragraph (a)(v), any or all of the following measures to be applied where such person pays such levy, or any part thereof, late or fails to pay such levy, or any part thereof, namely -
    - (i) a penalty or interest payable, at a rate determined in the notice;
    - (ii) the imposition of a daily fine for the benefit of the funds of the Authority not exceeding N\$ 10 000 per day for the duration of such late payment or failure to pay the levy;
    - (iii) the creation of an offence punishable by way of a fine not exceeding N\$ 100 000 or to imprisonment for a period not exceeding two years or to both such fine and such imprisonment;
  - (e) may state any other provision which the Authority considers necessary for the efficient administration of the imposition, payment or collection of the levy or the efficient application of this subsection.

(6) Unless specifically otherwise stated in the notice referred to in subsection (1), in the event where the notice states the person who is responsible for the collection of the levy as contemplated in subsection (5)(a)(v), such person is liable to pay the total amount of the levy which such person should have collected, irrespective of whether the levy was collected or not.

(7) For avoidance of doubt, subsection (5)(d) applies in the same manner, with the necessary changes, to the payment of levies contemplated in subsection (6).

(8) Prior to imposing a levy under subsection (1), the Authority must –

(a) consult with such persons or bodies as the Authority deems representative of the energy source in question;

(b) in order to maintain a reasonable stability, in real terms, in energy levies avoid, in so far as possible, substantial increases in levies or the introduction of new levies in any period of 12 consecutive months; and

(c) consider any other matter the Authority deems relevant.

(9) The Authority may withdraw or amend any levy imposed under this section and the provisions of this section, in as far as they are applicable, apply in the same manner, with the necessary changes, to such withdrawal or amendment.

(10) For purposes of this section -

(a) a “service provider of an energy source” means a person who manufactures, produces, generates, transmits, distributes, stores, transports, provides, supplies, sells, imports or exports an energy source;

(b) “failure to pay”, without limiting the generality of this expression, includes a refusal to pay.

### **Financial year**

**20.** The financial year of the Authority ends on 31 March in each year.

### **Accounts and audit**

**21.** (1) The Authority must, in accordance with international financial reporting standards, cause proper books and records of account to be kept of all its financial transactions, assets and liabilities.

(2) As soon as possible after the end of each financial year, the Authority must have financial statements prepared for that year, consisting of a statement of

income and expenditure and a balance sheet which must reflect the Authority's financial position as at the end of the financial year.

(3) The Authority's books and records of accounts and financial statements must be audited annually by an auditor or auditors engaged in public practice as defined in section 1 of the Public Accountants and Auditors Act, 1951 (Act No. 51 of 1951) and who must be appointed by the Authority with the prior approval of the Minister.

(4) For the purpose of performing the functions in terms of this Act, an auditor of the Authority has all the powers which are vested in the Auditor-General with respect to a statutory institution in terms of section 26(1) of the State Finance Act, 1991 (Act No. 31 of 1991), and which the Auditor-General would have been competent to exercise had the Auditor-General been assigned the duty to act as auditor of the Authority by this Act.

(5) The auditors must prepare a report on the audit of the books and records of account and the financial statements of the Authority and submit such report to the Authority within four months after the end of the financial year in respect of which the audit has been carried out.

#### **Furnishing of information and annual report**

- 22.** (1) The Authority must –
- (a) furnish to the Minister such information as the Minister may call for in connection with the activities and financial position of the Authority; and
  - (b) within six months after the end of each financial year, submit to the Minister a report on its activities during that financial year, which must include –
    - (i) the Authority's audited balance sheet and income and expenditure statement, and any notes thereon or document annexed thereto providing information required by this Act;
    - (ii) the audit report of the auditors;
    - (iii) a statement on the extent to which the Authority has met its objectives;
    - (iv) in the event of a Tribunal having been established, the activities of the Tribunal including summarised information as regards the types of disputes and other matters considered by the Tribunal and the outcomes thereof subject thereto that the Authority must prepare this part of the report in concurrence with the Tribunal;

- (v) such other matters as may be required by or under any other law; and
  - (vi) such other information in respect of the financial affairs of the Authority, relative to its objectives, as the Authority may deem appropriate to provide.
- (2) The balance sheet and statements referred to in subsection (1)(b) must –
- (a) be in conformity with international financial reporting standards;
  - (b) fairly present the state of affairs and activities of the Authority and the results thereof; and
  - (c) refer to any material matters not specifically provided for in this Act which affect or are likely to affect the affairs of the Authority, both by way of figures and a descriptive report, amplifying and explaining, where necessary, figures in the financial statements.
- (3) The Minister must table the report referred to in subsection (1)(b) before the National Assembly within 30 days after the receipt thereof, if the National Assembly is then in ordinary session, or, if it is not in ordinary session, within 30 days after the commencement of its first ensuing ordinary session.

#### **PART IV ENFORCEMENT PROVISIONS**

##### **Power of Authority regarding directives and penalties**

**23.** (1) The Authority must supervise compliance with this Act and, in accordance with the provisions thereof, energy sector specific legislation and may give written directives to the holder of a licence under an energy sector specific legislation or to a customer, client, consumer or other person to whom this Act or an energy sector specific legislation applies or as regards a condition or term contained in a licence.

(2) Directives aim at promoting, enforcing or ensuring compliance with relevant laws and may not conflict with this Act or any other law.

(3) A directive, without limiting the power of the Authority to issue general directives, may include one or more of the following types of directives:

- (a) a compliance directive ordering a person to take such action as may be necessary to ensure compliance;
- (b) a cease and desist directive ordering a person to cease, within a specified period, non-compliant behaviour;

- (c) a remedial action directive ordering a person to implement remedial action by taking such action or adopting such practice, as the Authority requires and as set out in the directive, for remedying a non-compliance or preventing the recurrence of a non-compliance;
  - (d) a compliance programme directive ordering a person to draw up, submit for approval to the Authority and implement a particular programme for compliance;
  - (e) a penalty directive ordering a person to pay a penalty determined in accordance with this section;
  - (f) a directive of a kind provided for in any energy sector specific legislation.
- (4) A directive given by the Authority under this section –
- (a) must clearly set out the directive, the non-compliance and any other issues involved, the reasons for the directive and, if applicable, the period within which there must be compliance with the directive;
  - (b) must inform the person to whom the directive is addressed of such person's right to make written presentations to the Authority regarding the directive or any other matter related thereto within the period specified therein;
  - (c) may contain such other information as the Authority may deem appropriate.
- (5) After consideration of the written representations or, in the event where notwithstanding the request, no representations were received within the period specified, the Authority may –
- (a) withdraw the directive;
  - (b) issue a final directive with or without amendments and specify a reasonable period or periods within which the person must comply with the directive.
- (6) A person who fails to comply with a directive of the Authority given under this section is –
- (a) liable to a penalty, for the benefit of the funds of the Authority, imposed by the Authority subject thereto that such penalty may not exceed N\$50 000; and
  - (b) is guilty of an offence and liable to a fine not exceeding N\$24 000 or imprisonment for a period not exceeding two years or both.

(7) An additional penalty, for the benefit of the funds of the Authority, of not exceeding N\$5 000 for each day which the failure contemplated in subsection (6) continues, irrespective of the number of days during which such failure continues, may be imposed by the Authority.

(8) When imposing a penalty under this section, the Authority must consider all relevant matters, including but not limited to -

- (a) the nature, extent and the gravity of the non-compliance;
- (b) the nature and extent of any loss or damage suffered as a result of the non-compliance;
- (c) the circumstances in which the non-compliance took place;
- (d) whether the person has engaged in any similar conduct and been found to be in non-compliance in respect of that conduct;
- (e) whether the person has in place a compliance programme approved by the Authority and, if so, whether the person has been complying with that programme.

(9) A person with regard to whom a directive is given or on whom a penalty is imposed by the Authority under this section, may appeal against such directive or penalty to the Tribunal and, in the event of there not having been a Tribunal established, the High Court.

(10) The Authority may postpone compliance with a directive given or payment of a penalty imposed, pending the outcome of an appeal under subsection (9).

(11) A penalty imposed by the Authority is payable to the Authority, is deemed to be a debt due to the Authority and may be recovered by the Authority by way of judicial process in a competent court.

(12) Steps taken under this section –

- (a) do not exempt a person from civil or criminal liability in respect of an act or omission on account of which those steps were taken;
- (b) do not preclude the Authority from suspending or cancelling a licence.

### **Warning notices**

**24.** Without derogating from the Authority's right to issue a directive as contemplated in section 23 or to take any such other action as it deems appropriate, the Authority may at any time issue a warning notice to a person if the Authority has reasonable grounds to suspect that such person's conduct may constitute a

contravention of any provision of this Act or an energy sector specific legislation or, based on the perceived conduct of such person, such conduct would likely result in such contravention.

### **Conduct involving more than one non-compliance**

**25.** (1) If the conduct of a person constitutes a non-compliance with more than one provision of this Act or any energy sector specific legislation, directives may be given against such person in relation to the person's non-compliance within any one or more of those provisions, and where appropriate, with penalties imposed in respect of each non-compliance.

(2) However, the person is not liable to more than one penalty under this section in respect of the same conduct subject thereto that a penalty imposed under section 23(6)(a) and (7) in respect of the same conduct is deemed to be one penalty.

### **Urgent relief**

**26.** (1) Notwithstanding rule 73(4) of Rules of the High Court of Namibia as published in Government Gazette No 5392 of 17 January 2014, Notice No. 4 of 2014, if the Authority on reasonable grounds believe that any person has engaged, or is proposing to engage, in conduct which constitutes or which may constitute a transgression or infringement of this Act or any energy sector specific legislation and that it is necessary for the Authority to act as a matter of urgency for the purpose -

- (a) of preventing serious, irreparable damage to any person or category of persons; or
- (b) of protecting public interest,

the Authority may make application to the High Court in accordance with the remainder of said rule 73 for urgent relief to prohibit the person from engaging in such conduct.

(2) Subsection (1) applies with the necessary changes in the event where there is a failure to act by a person and such failure constitutes or may constitute a transgression or infringement contemplated in that subsection.

(3) In proceedings under this section, the standard of proof is the same as the standard of proof in the High Court with regard to urgent applications and interdicts.

(4) Relief granted by the High Court pursuant to this section may, depending on the requirements met, be in the form of interim or final relief.

(5) A person affected by an order that has a final or irreversible effect may appeal to the Supreme Court against that order.

## **Enforceable undertakings**

27. (1) If deemed appropriate and in the public interest, the Authority may, in lieu of applying any other enforcement mechanism at its disposal in the event of a non-compliance with this Act or an energy sector specific legislation, accept a written undertaking given by a person containing such terms as may be sufficient to rectify or efficiently address the non-compliance.

(2) Terms contemplated in subsection (1) may include the manner in which or the amount to which persons negatively affected by such non-compliance would be compensated.

(3) A person may, subject to the prior written consent of the Authority, withdraw or vary the undertaking at any time.

(4) If the Authority is of the opinion that the person who gave the undertaking has breached any of its terms, the Authority may apply to the Tribunal, or in the event of the Tribunal not having been established, the High Court for an order under subsection (5).

(5) If the Tribunal or High Court, as the case may be, is satisfied that the person has breached a term of the undertaking, the Tribunal or High Court may make any or more than one of the following orders:

- (a) An order directing the person to comply with that term of the undertaking;
- (b) an order directing the person to pay the Authority an amount up to the amount of any financial benefit which the person has obtained directly or indirectly and which is attributable to the breach;
- (c) an order that the Tribunal or High Court considers appropriate directing the person to compensate any other person who has suffered loss or damage as a result of the breach;
- (d) any other order that the Tribunal or High Court considers appropriate.

(6) The Authority may prepare guidelines on the matters it will consider before accepting an enforceable undertaking and, if it prepares such guidelines, the Authority must publish the guidelines on its website.

## **Court orders**

28. (1) The Authority may apply to the Tribunal or, in the event of the Tribunal not having been established, the High Court to make a directive issued in terms of this Act or an energy sector specific legislation an order of court.

(2) The Authority must, in the application contemplated in subsection (1), provide reasonable proof that -

- (a) the directive was issued;
- (b) the directive was delivered to the person to whom it applies;
- (c) such person was provided with the opportunity to respond to the directive; and
- (d) such person failed to comply with the directive,

and may include in such application such other information as the Authority may deem appropriate.

(3) If the Tribunal or High Court, as the case may be, is satisfied that the criteria mentioned above have been met, the Tribunal or High Court may make the directive an order of court.

#### **Disqualifications and prohibitions relating to certain persons, directors or officers**

**29.** (1) Where a person, director or officer, who directly or indirectly participated in the management of a company involved in any regulated activity in terms of energy sector specific legislation, persistently failed to comply with such energy sector specific legislation or such person, director or officer has, where the relevant company has failed to so comply, persistently failed to take reasonable steps to obtain compliance, the Authority may -

- (a) in accordance with section 226 of the Companies Act, 2004 (Act No. 28 of 2004), apply to the High Court for an order directing that such person, director or officer must not, without leave of the High Court, be a director of or in any way, whether directly or indirectly, be concerned or take part in the management of any company;
- (b) refuse to consider an application for a licence or any similar authority applied for by a company under energy sector specific legislation in which company's management such person, director or officer, directly or indirectly, participates.

(2) Section 226 of the Companies Act, 2004, applies with the necessary changes to an application brought by the Authority under subsection (1).

(3) Subsection (1)(b) applies, with the necessary changes, to a member, manager, person, officer, trustee or director who directly or indirectly participates in the management of a close corporation, a trust or a cooperative applying for a licence or any similar authority under energy sector specific legislation.

## **PART V**

## **ENERGY TRIBUNAL**

### **Establishment of Tribunal and jurisdiction**

**30.** (1) Whenever the Minister deems it conducive to the Namibian energy sector, the Minister may establish an Energy Tribunal to consist of not more than three members appointed by the Minister as provided for in section 31 and of whom one must be appointed by the Minister as Chairperson of the Tribunal.

(2) The seat of the Tribunal is Windhoek but the functions of the Tribunal may be performed at any such place in Namibia as the Chairperson of the Tribunal may determine.

(3) The Tribunal has jurisdiction to consider, inquire into and decide on any matter submitted to it in terms of this Act or any relevant energy sector specific legislation.

(4) The Tribunal has, in connection with any proceeding before it, all such powers and jurisdiction as are possessed by a single judge of the High Court in a civil matter before the High Court.

(5) A decision, order or determination of the Tribunal may be executed as if it were a decision, order or determination made by the High Court.

(6) An appeal against any decision, order or determination of the Tribunal lies to the High Court and any party to any proceeding before the Tribunal may appeal against any decision, order or determination of the Tribunal as if it were a judgement, decision or an order given in civil proceedings by a magistrates' court being appealed against to the High Court.

(7) All expenses incidental to the performance of the functions of the Tribunal, including the remuneration of its member or members and staff, if any, must be defrayed from money appropriate by Parliament and made available to the Ministry responsible for energy for the purposes of the Tribunal.

### **Members of Tribunal**

**31.** (1) The Minister appoints the member or members of the Tribunal from amongst persons nominated by the Minister responsible for justice after the Minister responsible for justice has consulted thereon with the Judicial Service Commission, whether Namibian citizens or not, who have experience and expertise in the adjudication of disputes and appeals lodged under this Act and relevant energy sector specific legislation.

(2) A member of the Tribunal may be appointed on a part-time or full-time basis for a term of not longer three years and is eligible for reappointment at the end of that term.

(3) A person may not be appointed as a member of the Tribunal, if such person –

- (a) is subject to a disqualification specified in section 4(3)(b), (c), (d), (e) or (f);
- (b) has a direct or an indirect interest in any energy related activity or entity which may affect his or her objectivity or independence.

(4) A member of the Tribunal may not perform any function as a member unless such member has taken an oath or made an affirmation in the prescribed manner and form.

(5) Sections 6, 36 and 38 apply, in so far as they are relevant, in a similar manner with the necessary changes to members of the Tribunal.

(6) A member of the Tribunal must be paid from money contemplated in section 30(7) such remuneration and allowances as the Minister determines.

(7) If a member of the Tribunal or his or her spouse, life partner or child or any company, close corporation or partnership of which such member or his or her spouse, life partner or child is a director, an employee, consultant, shareholder, member or partner, is in any way directly or indirectly interested in, or has a pecuniary or other interest in, any matter which is the subject of consideration by the Tribunal, and which may cause a conflict with the proper, objective and independent performance of such member's functions, such member must –

- (a) forthwith, fully disclose the nature of such interest to the Tribunal; and
- (b) may not take part in the proceedings or exercise any powers in relation to the matter to which the proceedings relates.

(8) A disclosure by a member of the Tribunal in accordance with subsection (6) must be recorded by the Tribunal.

(9) A member of the Tribunal who fails to comply with subsection (1) commits an offence and is liable to a maximum fine of up to N\$50 000 or to imprisonment for a period not exceeding two years, or to both such fine and imprisonment.

### **Proceedings of Tribunal**

**32.** (1) The Tribunal meets as and when it has business to transact as anticipated in this Act.

(2) In any proceeding before the Tribunal a party to such proceeding may appear in person or may be represented by a person of such party's choice.

(3) If deemed necessary and after consultation with the Tribunal, the Authority may appoint any person or designate an employee of the Authority to be the secretary of the Tribunal who shall be responsible for the administrative work of the Tribunal.

(4) In any proceeding before the Tribunal, the Tribunal may –

- (a) accept evidence by affidavit or take oral evidence on oath or affirmation;
- (b) allow any witness to be cross-examined on his or her affidavit or oral evidence;
- (c) if relevant, confirm, set aside or vary the decision, order or determination in question;
- (d) make such order as to costs as it may deem fit.

(5) The Tribunal must, in any proceeding before it, record the proceedings and any evidence heard by it and the decision, order or determination made by it and the reasons therefor.

(6) Proceedings before the Tribunal must be conducted in accordance with the rules of the Tribunal as prescribed by the Minister, after consultation with the Authority and the Minister responsible for justice, which may include rules relating to –

- (a) the conduct of proceedings of, and the rules of evidence applicable to, any matter before the Tribunal;
- (b) the manner in which any matter to be heard and determined or decided upon by the Tribunal may be brought and continued before it;
- (c) the fees payable in respect of the service or execution of any process of the Tribunal and the tariff of costs and expenses which may be allowed in respect of such service or execution;
- (d) the taxation of bills of costs;
- (e) the summary determination of any matter which appears to the Tribunal to be frivolous or vexatious or brought for the purpose of delay or any other alternative motive;
- (f) the period within which and the manner in which an appeal from a decision, order or determination of the Tribunal to the High Court may be noted;

- (g) generally, any matter which may be necessary or expedient to prescribe in order to ensure the proper dispatch and conduct of proceedings of the Tribunal.

### **Assessors**

**33.** (1) The Tribunal may appoint any person with special expert knowledge to act as an assessor in an advisory capacity in any case where it appears to the Tribunal that such knowledge is required for the proper determination of the matter.

(2) The Minister may, by means of rules of the Tribunal, prescribe the terms and conditions applicable to the appointment of assessors and the remuneration payable to assessors.

(3) The Tribunal must give due consideration to, but is not bound by, the opinion of an assessor.

### **Summoning of witnesses**

**34.** (1) A party to any proceeding before the Tribunal may procure the attendance of a witness in the manner provided for in the rules of the Tribunal.

(2) A member of the Tribunal and an assessor in any proceeding before the Tribunal may put any question to a witness appearing before it.

(3) If any person, who has been duly subpoenaed to attend any proceedings before the Tribunal for the purpose of giving evidence or producing any book, record, document or thing in his or her possession or under his or her control, fails without reasonable cause to attend or to give evidence or to produce that book, record, document or thing according to the subpoena or, unless excused by the Tribunal, to remain in attendance throughout the proceedings, the Tribunal may, on being satisfied upon oath or affirmation or by return of the person by whom the subpoena was served, that such person has been duly subpoenaed and that his or her reasonable expenses have been paid or offered to him or her, impose upon the said person a fine not exceeding N\$10 000.

(4) A fine imposed in terms of subsection (3) is for the benefit of the State.

### **Contempt of Tribunal**

**35.** A person who –

- (a) insults, disparages or belittles any member of the Tribunal in that capacity, or prejudices, influences or anticipates the proceedings or findings of the Tribunal;

- (b) wilfully interrupts the proceedings of the Tribunal or misconducts himself or herself in any manner during such proceedings;
- (c) does anything in relation to the Tribunal which if done in relation to a court of law would have constituted contempt of court,

commits an offence and on conviction is liable to a fine not exceeding N\$ 12 000 or to imprisonment for a term not exceeding 12 months or to both such fine and such imprisonment.

## **PART VI MISCELLANEOUS**

### **Limitation of liability**

**36.** A person is not liable in respect of any act done or omitted in good faith in the exercise of a power or the performance of a duty in terms of or under this Act or any energy sector specific legislation.

### **Disclosure of interest by members**

**37.** (1) If a member or his or her spouse, life partner or child or any company, close corporation or partnership of which the member or his or her spouse, life partner or child is a director, an employee, consultant, shareholder, member or partner, is in any way directly or indirectly interested in a contract entered, or proposed to be entered, into by the Authority, or has a pecuniary or other interest in any other matter which is the subject of consideration by the Board or committee, and which may cause a conflict of interests in the performance of his or her duties as member, that member must –

- (a) forthwith, fully disclose the nature of such interest at the meeting of the Board or committee at which such contract or other matter is the subject of consideration;
- (b) withdraw from the meeting so as to enable the remaining members to determine whether the member is precluded from participating in such meeting by reason of a conflict of interests and to discuss and to take a decision on the matter in the absence of the member experiencing the conflict of interests.

(2) A disclosure by a member in accordance with subsection (1), and the decision taken by the remaining members in connection therewith, must be recorded in the minutes of that meeting.

(3) A member who fails to comply with subsection (1) commits an offence and is liable on conviction to a maximum fine of up to N\$50 000 or to imprisonment for a period not exceeding two years, or to both such fine and imprisonment.

## **Non-disclosure and prohibition relating to undue benefits**

**38.** (1) A person who is or was concerned in the performance of any function in terms of this Act or any energy sector specific legislation may not disclose any information which he or she obtained in the performance of the function except –

- (a) to any person who of necessity requires it for the performance of his or her functions in terms of this Act or any energy sector specific legislation;
  - (b) if he or she is a person who of necessity supplies it in the performance of his or her functions in terms of this Act or any energy sector specific legislation;
  - (c) if such information is required by order of a court of law;
  - (d) to any competent authority which requires it for the institution, or an investigation with a view to the institution, of any criminal prosecution;
  - (e) in the event where such information is already in the public domain;  
or
  - (f) the amount of any approved energy sector tariff.
- (2) Any person who –
- (a) gives, offers or agrees or attempts to give any gift or consideration to a person contemplated in subsection (1) as an inducement or reward for doing, or forbearing, to do, or for having done or forborne to do any act in relation to the latter person's functions or for showing or forbearing to show favour or disfavour to any person in the performance of his or her functions; or
  - (b) being a person contemplated in subsection (1), accepts or obtains or agrees to accept or attempts to obtain from any person any gift or consideration as an inducement or reward for doing, or forbearing to do, or having done or forborne to do any act in relation to the person contemplated in subsection (1)'s functions or for showing or forbearing to show favour or disfavour to any person in the performance of such functions,

commits an offence and is liable on conviction to a maximum fine of up to N\$50 000 or to imprisonment for a period not exceeding two years, or to both such fine and imprisonment.

(3) A person who fails to comply with subsection (1) commits an offence and is liable to a maximum fine of up to N\$100 000 or to imprisonment for a period not exceeding two years, or to both such fine and imprisonment.

(4) A person who is or was concerned in the performance of any function in terms of this Act or any energy sector specific legislation may not, in any undue manner, use confidential information or information not falling within the ambit of subsection (1)(a) to (f) which he or she obtained, during such performance, for personal gain whether such gain is monetary or otherwise.

(5) If a person is convicted of an offence under subsection (1), (2) or (4), the court shall summarily enquire into and determine the monetary value of any advantage or potential advantage which such person has or could have gained in consequence of the offence, and, in addition to any other penalty that may be imposed in respect of that offence, impose a fine of not more than three times the value so determined, which fine may be recovered as a civil judgement.

### **Delegation of powers and assignment of duties**

**39.** (1) The Board may, subject to such conditions as the Board may determine, in writing –

- (a) delegate any power, excluding the power to make rules under section 41, conferred on the Board by or under this Act or any energy sector specific legislation;
- (b) assign the performance of any duty entrusted to the Board by or under this Act, or any energy sector specific legislation,

to the Chairperson of the Board, the Chief Executive Officer or any committee.

(2) The Chief Executive Officer, acting with the written approval of the Board, may, subject to such conditions as the Chief Executive Officer may determine, in writing –

- (a) delegate to an employee of the Authority any power;
- (b) assign to an employee of the Authority the performance of any duty,

delegated or assigned to the Chief Executive Officer under subsection (1) or entrusted to the Chief Executive Officer by or under this Act or any energy sector specific legislation.

(3) The Board or the Chief Executive Officer is not divested of a power or duty delegated or assigned by the Board or the Chief Executive Officer under subsection (1) or (2), respectively, and may amend or withdraw any decision made in the exercise of that delegated power or performance of that assigned duty.

(4) A delegation or assignment under this section does not absolve the Board or the Chief Executive Officer from the ultimate responsibility to govern or manage, as the case may be, the affairs of the Authority as set out in this Act.

## **Regulations**

**40.** (1) The Minister may, by notice in the Gazette, make regulations with regard to –

- (a) any matter which in terms of this Act is required or permitted to be prescribed;
- (b) further functions, powers and duties of the Authority;
- (c) any other matter the regulation of which, in the opinion of the Minister, is necessary or expedient to achieve or promote the objectives of this Act.

(2) A regulation made under subsection (1) may prescribe penalties for any contravention thereof or failure to comply therewith of a fine not exceeding N\$24 000 or imprisonment for a period not exceeding two years or both such fine and such imprisonment.

## **Rules**

**41.** (1) The Authority may, after consultation with the Minister, by notice in the Gazette make rules with regard to –

- (a) any matter which in terms of this Act is required or permitted;
- (b) the manner in which the Authority must make decisions under this Act including any procedures with regard to the making of decisions;
- (c) any other matter the regulation of which, in the opinion of the Authority, is necessary or expedient to achieve or promote the objectives of this Act.

(2) A rule made under subsection (1) may determine penalties for any contravention thereof or failure to comply therewith of a fine not exceeding N\$24 000 or imprisonment for a period not exceeding two years or both such fine and such imprisonment.

## **Investigation by Authority**

**42.** (1) The Authority may, either on its own initiative or upon receipt of information or a complaint from any person, start an investigation into any conduct or proposed conduct which is alleged to be or to potentially be a transgression of this Act or any energy sector specific legislation.

(2) For the purposes of conducting an investigation, the Authority may use such powers as are available to it by or under this Act and the relevant energy sector specific legislation.

### **Authority to enter and search under warrant**

**43.** (1) An employee of the Authority or an inspector may enter any building or premises and may make there -

- (a) such investigation or enquiry;
- (b) seize anything,

which in the opinion of such employee or inspector has a bearing on the investigation.

(2) Subject to section 44, a building or premises may be entered in terms of subsection (1) only by virtue of a warrant issued by a judge of the High Court or by a magistrate in whose area of jurisdiction the building or premises are situated.

(3) Any person duly authorised thereto by the Authority may apply for a warrant contemplated in subsection (2) and such application must be supported by an affidavit or a solemn declaration by the person making the application, or any other person having knowledge of the facts, stating -

- (a) the nature of the investigation being conducted;
- (b) the reason or suspicion which gave rise to the investigation; and
- (c) the need for a search and seizure in terms of this section for purposes of the investigation.

(4) A judge or magistrate to whom an application for a warrant is made in terms of subsection (3) may issue a warrant authorising entry and search of the building or premises concerned if it appears to the judge or magistrate from the information furnished that there are reasonable grounds for believing that -

- (a) a transgression of this Act or any energy sector specific legislation has taken place, is taking place or is likely to take place; and
- (b) that anything connected with the investigation into such transgression is in or on that building or premises.

(5) A warrant to enter and search a building or premises may be issued on any day and must specifically -

- (a) identify the building or premises which may be entered and searched; and

- (b) authorise an employee of the Authority or an inspector mentioned in the warrant to conduct the entry and search of the building or premises.

(6) A warrant to enter and search a building or premises is valid until one of the following events occurs -

- (a) the warrant is executed;
- (b) the warrant is cancelled by the judge or magistrate who issued it or, in that person's absence, by another person having the authority to do so;
- (c) the purpose for issuing the warrant has lapsed;
- (d) the expiry of one month after the date the warrant was issued.

(7) A warrant issued under this section may be executed only between 06:00 and 18:00 unless the judge or magistrate who issued it on good cause shown authorises that it may be executed at or during a different time.

(8) Before commencing with the execution of a warrant to enter and search a building or premises, the person authorised by the warrant must -

- (a) if a person who is in apparent control of the building or premises is present -
  - (i) identify herself or himself to that person;
  - (ii) hand a copy of the warrant to that person; and
  - (iii) supply that person, at such person's request, with particulars regarding her or his authority to execute the warrant in accordance with the powers conferred by section 45;
- (b) if no person is present, affix a copy of the warrant to a prominent and visible place on the building or premises.

#### **Authority to enter and search without a warrant**

**44.** (1) Notwithstanding section 43, an employee of the Authority or an inspector may, without a warrant of entry and search contemplated in that section, enter and search a building or premises (other than a private dwelling, except if such dwelling is also used for business purposes) for the purpose of attaching and removing, if necessary, any book, document, article, item or other thing if -

- (a) the person in apparent control of the building or premises consents to the entry, search, seizure and removal thereof;

- (b) the employee or inspector on reasonable ground believes -
  - (i) that a warrant of entry and search will be issued if application is made therefor under section 43;
  - (ii) that the delay in obtaining a warrant would defeat the object of the entry and search.

(2) Immediately before entering and searching a building or premises in terms of this section, the person exercising the power must, if the person in apparent control of the building or premises is present -

- (a) identify herself or himself to that person; and
- (b) supply that person, at her or his request, with particulars regarding -
  - (i) her or his authority to enter and search the building or premises without a warrant; and
  - (ii) the powers conferred by section 45.

(3) An entry and search without a warrant may be carried out between 06:00 and 18:00 unless doing it at or during another time is justifiable and necessary in the circumstances.

### **Powers to enter and search**

**45.** (1) A person authorised to enter and search under section 43 or 44 may -

- (a) enter the building or premises;
- (b) search the building or premises;
- (c) search any person on or in such building or premises if there is reasonable ground for believing that the person has personal possession of any book, document, article item or thing having a bearing on the investigation;
- (d) examine any book, document, article, item or thing on or in the building or premises having a bearing on the investigation;
- (e) request information about any book, document, article, item or thing from the owner or other person in apparent control of the building or premises or from any person who has control or possession of the book, document, article, item or thing or from any other person who may have the information;

- (f) take extracts from, or make copies of, any book, document, article, item or thing in or on the building or premises having a bearing on the investigation;
- (g) in the presence of a person apparently in charge of, or employed at, the building or premises, use any computer system in or on the building or premises, including any off-site data storage used or accessed by such computer system, or require the assistance of any such person to use that computer system, to -
  - (i) search any data contained in or available to that computer system;
  - (ii) reproduce any record from that data; and
  - (iii) seize any output from that computer for examination and copying; and
- (h) attach and, if necessary, remove from the building or premises for examination and safekeeping anything having a bearing on the investigation.

(2) Notwithstanding paragraph (g) of subsection (1), if a person contemplated in that paragraph is not present or not able to give the assistance required by the employee of the Authority or the inspector, the latter may proceed to use the computer system if in the circumstances of the case any delay may prejudice the purpose for which the entry and search is carried out.

(3) A person conducting an entry and search of a building or premises may be accompanied and assisted by any other employee of the Authority, inspector or a police officer, or by any other person authorised by the Chief Executive Officer for that purpose.

### **Conduct of entry and search**

**46.** (1) A person who enters and searches any building or premises under section 43 or 44 must exercise those powers with strict regard for decency and order, and with regard for each person's right to dignity, freedom, security and privacy.

(2) The search of a person under section 45(1)(c) may be conducted only by a person of the same gender as the person to be searched.

(3) A person who enters and searches a building or premises under section 43 or 44 must, before questioning any person -

- (a) advise that person of the right to be assisted by a legal practitioner; and

- (b) allow that person to exercise that right.
- (4) A person who removes anything from a building or premises being searched must-
  - (a) issue a receipt for it to the owner or other person in control of the premises; and
  - (b) return it as soon as practicable after achieving the purpose for which it was removed.
- (5) If the owner or person in control or possession of any book, document, article, item or thing refuses to allow the employee of the Authority or the inspector conducting a search to inspect that book, document, article, item or thing on the ground that it contains privileged information, the employee or inspector may request the registrar or sheriff of the High Court, or the messenger of the magistrate's court of the area of jurisdiction where the building or premises are situated, to attach and remove it for safe custody until a competent court determines whether or not the information is privileged.
- (6) An employee of the Authority, inspector or a police officer who accompanies and assists an employee or inspector who conducts an entry and search of a building or premises under section 43 or 44, may overcome resistance to the entry and search by using such force as is reasonably required, including breaking out a door, a window or other access point of or to the building or premises or any container or receptacle in or on the building or premises.
- (7) Before using force as contemplated in subsection (6) to gain access to any building or premises or part thereof, the employee of the Authority, the inspector or police officer must audibly demand admission and must announce the purpose of the entry, except if the circumstances are such that immediate entry must be gained to prevent concealment, loss or destruction of anything on or in the building or premises.
- (8) To the extent that sections 43, 44, 45 and this section interferes with the right to privacy of any person under Article 13(1) of the Namibian Constitution, such interference is authorised on the grounds of public safety and economic well-being as contemplated in Article 13(2) of the Namibian Constitution.

## **Forfeiture**

- 47.** (1) If a person is convicted by a court of an offence under this Act or, unless specifically stated therein, under any energy sector specific legislation, that court may declare any item or thing used in the commission of the relevant offence to be forfeited to the State.
- (2) The State may deal with any item or thing forfeited as anticipated in subsection (1) as it thinks fit, subject thereto that the laws relating to criminal procedure in Namibia dealing with the enforcement of rights by persons to property

other than persons from whom the property was seized, apply with the necessary changes to property contemplated in this subsection.

(3) Section 35(2), (4) and (5) of the Criminal Procedure Act, 2004 (Act No. 25 of 2004), applies with the necessary changes to an item or thing forfeited in accordance with this section.

## **Offences**

- 48.** (1) A person who –
- (a) subject to subsection (2), contravenes or fails to comply with any provision of this Act applicable to him or her, the contravention of or failure to comply with which is not elsewhere in this Act determined to be an offence;
  - (b) fails to carry out a decision of the Authority under this Act;
  - (c) assaults, resists or obstructs an employee of the Authority, an inspector or a police officer who is exercising a power or performing a duty conferred or imposed on, or delegated or assigned to, such employee, inspector or police officer by or under this Act or any energy sector specific legislation;
  - (d) does anything calculated to improperly influence an employee of the Authority, an inspector or a police officer concerning any matter connected with an investigation under this Act or any energy sector specific legislation;
  - (e) defames an employee of the Authority or inspector in his or her official capacity;
  - (f) knowingly provides false information to an employee of the Authority or inspector;
  - (g) fails to comply with a lawful direction or requirement of an employee of the Authority, an inspector or a police officer under this Act or any energy sector specific legislation; or
  - (h) falsely pretends that he or she is an employee of the Authority or inspector or has any of the powers of such an employee or inspector under this Act or under any authorisation of the Authority issued under this Act or any energy sector specific legislation,

commits an offence and is liable to a fine not exceeding N\$24 000 or to imprisonment for a period not exceeding two years, or to both such fine and such imprisonment.

(2) Unless the Authority deems it not practical under circumstances to do so or unless the nature of, or the circumstances surrounding, the offence does not warrant to do so, in which case this requirement may be dispensed with, prior to any person or body charging a person under subsection (1)(a), the Authority must in writing notify such person that such person has committed an offence setting out in such notification the details of the offence and further specifying the period and manner within which such person must rectify such contravention or failure, which period, unless there is compelling reason for a shorter period, may not be less than five days.

(3) If a person referred to in subsection (2), rectifies the contravention or failure in the manner and within the time frame determined by the Authority, such person may not be charged with such offence as referred to in that subsection.

(4) (a) Without derogating from the provisions of the Anti-Corruption Act, 2003 (Act No. 8 of 2003), no action or proceedings of a disciplinary, civil or criminal nature may be instituted or maintained by any person, licensee or authority against any informer or a person who has assisted the Authority in an investigation into an alleged or suspected contravention of this Act or any energy sector specific legislation, regulations, rules, codes or licence conditions, or offences under this Act or any other law in respect of any information, other than a material statement which he or she knew or believed to be false or did not believe to be true, disclosed by him or her to the Authority for the purpose of assisting the Authority in the performance of its functions under this Act.

(b) The identity of such an informer must be protected by the Authority.

### **Adjustment of fines and penalties**

49. The Minister may, whenever deemed necessary by him or her and after consultation with the Authority and the Minister responsible for justice, by notice in the Gazette adjust the maximum amount of a fine or penalty specified in sections 19(5)(d)(ii) and (ii), 31(9), 34(3), 35, 37(3), 38(2) and (3), 40(2), 41(2) and 48(1) to ensure that such fine or penalty is of such an amount to be an appropriate deterrent or punishment as regards the non-compliance or transgression to which it relates.

### **Transitional provisions**

50. (1) There must be transferred to the Authority on the date determined by the Minister without any further assurance all assets, funds, resources and other movable or immovable property which immediately before the appointed day were vested in the Electricity Control Board under the repealed Act.

(2) As from the date determined by the Minister under subsection (1) –

(a) the assets, rights, interests, obligations and liabilities of the Electricity Control Board existing immediately before the

determined date under any contract or instrument, or at law or in equity apart from any contract or instrument, are by virtue of this Act assigned to and vested in the Authority;

- (b) any such contract or instrument as is contemplated in paragraph (a) of this section is of the same force and effect against or in favour of the Authority and is enforceable as fully and effectively as if instead of the Electricity Control Board, the Authority had been named therein or had been a party thereto;
- (c) the Authority is subject to all the obligations and liabilities to which the Electricity Control Board was subject immediately before the determined date, and all persons are from the determined date have the same rights, powers and remedies against the Authority as they had against the Electricity Control Board immediately before the determined date;
- (d) notwithstanding anything to the contrary in this Act, the members of the Electricity Control Board appointed under the repealed Act are deemed to be appointed as members of the Board of the Authority under section 4 of this Act and remain members of the Board of the Authority for the remaining term of their office as determined under the repealed Act and are eligible for reappointment if they qualify to be appointed as members under this Act;
- (e) decisions of the Electricity Control Board in force immediately before the establishment of the Authority remain in force until amended, replaced or repealed by the Authority.

(3) Any proceeding or cause of action pending or existing immediately before the determined date by or against the Electricity Control Board in respect of any right, interest, obligation or liability may be commenced, continued or enforced by or against the Authority as if this Act had not been made.

(4) As from the date of commencement of this Act –

- (a) the person who immediately before the commencement of this Act held the office of Chief Executive Officer of the Electricity Control Board is deemed to be the Chief Executive Officer of the Authority;
- (b) the persons who constituted the staff members of the Electricity Control Board immediately before the commencement of this Act are deemed to be the personnel of the Authority.

(5) The cost for the establishment of the Authority shall be appropriated by the Minister and paid into the funds of the Authority.

### **Repeal, amendment of laws and savings**

**51.** (1) The Electricity Act, 2007 (Act No. 4 of 2007), is herewith repealed.

(2) Notwithstanding subsection (1), anything done by the Electricity Control Board or the Minister in terms of the repealed, prior to the commencement of this Act, and which may be validly done by the Authority or the Minister in terms of repealed Act, is deemed to have been done in terms of this Act.

### **Short title and commencement**

**52.** (1) This Act is called the Namibia Energy Regulatory Authority Act, 2017, and, subject to subsection (2), comes into operation on a date determined by the Minister by notice in the Gazette.

(2) The Minister may under subsection (1) determine different dates for different sections of this Act.