MEMORANDUM OF OBJECTS OF THE DISASTER MANAGEMENT TAX RELIEF ADMINISTRATION BILL, 2020

1. PURPOSE OF THE BILL

1.1. The recent COVID-19 pandemic will have significant and potentially lasting impacts on the economy, with businesses facing the risk of cash flow problems. Tax compliant micro, small and medium-sized businesses play an important role in stimulating economic activity, job creation, poverty alleviation as well as the general improvement of living standards, and are expected to be amongst the hardest hit. In order to assist tax compliant micro, small and medium-sized businesses, Government proposes measures aimed at assisting to alleviate cash flow problems experienced during this difficult period.

1.2. Several countries have implemented measures whereby businesses are allowed to defer the transfer of payroll taxes to the tax authority. This can be in the form of a temporary suspension of payments for a fixed period (for most countries the suspension period is between 3 and 6 months), or by allowing businesses to pay taxes in instalments. The purpose of such measures is to assist businesses with liquidity in a time where business activity is likely to see an unprecedented decline in gross income. The benefit of the measure is immediate cash flow relief that could enable businesses to survive.

1.3. Furthermore, allowing for a deferral of interim payment and provisional tax liabilities should assist these businesses by providing additional cash flow during the crisis. This could be the difference between pushing a micro, small or medium sized business into liquidation, or providing some space for the business to get through the crisis and add to the economic recovery, hopefully being a source of higher tax revenue in the medium term.

1.4. A provision to increase the percentage of donations to be considered as tax-deductible donations when determining employees' tax, seeks to alleviate the cash flow difficulties of employees where their employers contribute to the Solidarity Fund on their behalf.

1.5. A provision is included to permit vendors currently registered under either Category A or Category B, i.e. vendors currently required to submit value-added tax (VAT), returns bi-monthly, to temporarily file their returns on a monthly basis, thereby being able to submit their VAT returns more frequently and expediting any refunds that may be due to the vendor.

1.6. Provision is also made for the extension of certain time periods prescribed under the tax Acts or the Customs and Excise Act, 1964, to allow taxpayers or traders more time to comply with obligations under these Acts.

2. SUMMARY OF PROVISIONS OF THE BILL

2.1. CLAUSE 1: DEFINITIONS

2.1.1. The definition of ''lockdown'' seeks to provide clarity on the origin and time period of the lockdown.

2.1.2. The definition of ''qualifying micro business'' seeks to provide clarity on the micro businesses that qualify for the relief under clause 4.

2.1.3. The definition of ''qualifying taxpayer'' seeks to provide clarity on the taxpayers that qualify for the relief under clauses 2 and 3.

2.1.4. The definition of ''Solidarity Fund'' seeks to provide clarity on which fund is intended for purposes of clause 5.

2.2. CLAUSE 2: DEFERRAL OF EMPLOYEES' TAX

2.2.1. Paragraph 2 of the Fourth Schedule to the Income Tax Act, 1962 (the ITA) makes provision for a resident employer or representative employer (in cases where the employer is non-resident) to deduct employees' tax, Pay-As-You-Earn (PAYE), from remuneration paid to its employees. In addition, the employer or representative employer must submit a return and the payment of PAYE withheld to the South African Revenue Service (SARS), within seven days after the end of the month for which the PAYE was deducted. Administrative penalties may be imposed in terms of paragraph 6 of the Fourth Schedule to the Act for late payment of PAYE.

2.2.2. In order to assist with alleviating any cash flow burden arising as a result of the COVID-19 pandemic, the following tax measures are proposed for qualifying employers, for a limited period of four months, beginning 1 April 2020 and ending on 31 July 2020:

2.2.2.1. Deferral of payment of 35% of the PAYE liability, commencing with the payment due by 7 May 2020 and ending with the payment due by 7 August 2020, without SARS imposing administrative penalties and interest for the late payment thereof.

2.2.2.2. The deferred PAYE liability must be paid to SARS in six equal instalments commencing with the payment due by 7 September 2020 and ending with the payment due by 5 February 2021.

2.2.3. For the purposes of this proposal, a small or medium-sized business means a business conducted by a company, partnership, individual or trust with a gross income not exceeding R100 million for the year of assessment ending on or after 1 April 2020 but before 1 April 2021, where such gross income does not include more than 20% in aggregate of interest, dividends, foreign dividends, royalties, rental from letting fixed property, annuities, and any remuneration received from an employer. Rental from letting fixed property is not considered for the purposes of this test if the primary trading activity of the company, trust, partnership or individual is the letting of fixed property and substantially the whole of the gross income is rental from fixed property. The requirement that the gross income of the business must not exceed R100 million for the year of assessment will be deemed to have been met if the Commissioner is satisfied that the taxpayer's estimate of the gross income for the year of assessment, when relying on a deferral under the Act during the year of assessment, was seriously calculated with due regard to the factors having a bearing thereon and was not deliberately or negligently understated.

2.2.4. The above-mentioned proposals will not apply to an employer or representative employer that—

2.2.4.1. has failed to submit any return as defined in section 1 of the Tax Administration Act, 2011 (the TAA) on the basis required by section 25 of the TAA; or

2.2.4.2. has any outstanding tax debt as defined in section 1 of the TAA, but excluding a tax debt—

2.2.4.2.1. in respect of which an agreement has been entered into in accordance with section 167 or 204 of the TAA;

2.2.4.2.2. that has been suspended in terms of section 164 of the TAA; or

2.2.4.2.3. that does not exceed the amount referred to in section 169(4) of the TAA.

2.2.5. However, penalties and interest will apply if the employer has understated the PAYE liability for any of the four months or if it is discovered that the employer does not qualify for relief under this clause. The usual procedures for requests for remittance of such penalties will be available in such cases.

2.2.6. **Example**

Employer A is a small business that meets the gross income and compliance requirements to qualify for deferral of employees' tax. Its gross PAYE liability for its April to July 2020 payrolls and the effect of the 35% deferral is set out below.

Payroll	Gross liability	35% deferral	65% Payable	Date due
April	150 000	52 500	97 500	7 May
May	145 000	50 750	116 000	5 June
June	155 000	54 250	100 750	7 July
July	150 000	52 500	97 500	7 Aug
Cash flow benefit		210 000		

The deferred PAYE liability is payable as follows.

Payroll	Amount payable	Date due
August	35 000	7 Sept
September	35 000	5 Oct
October	35 000	6 Nov
November	35 000	7 Dec
December	35 000	7 Jan
January	35 000	5 Feb

2.3. CLAUSE 3: DEFERRAL OF PROVISIONAL TAX

2.3.1. Paragraph 17 of the Fourth Schedule to the ITA, requires every provisional taxpayer to make provisional tax payments in respect of their annual tax liability. The provisional tax payment for the annual tax liability is based on an estimate by the taxpayer of total taxable income within stipulated parameters, or is based on an estimate made by the Commissioner for SARS in terms of paragraph 19(2) or 19(3) of the Fourth Schedule to the ITA.

2.3.2. Paragraphs 19(1), 21 and 23 of the Fourth schedule to the Act make provision for a provisional taxpayer to submit a return and make provisional tax payment to SARS. The first payment, which should be 50% of the total estimated liability, must be made within six months after the commencement of the year of assessment. The second payment, which is the total estimated liability for the year of assessment, reduced by the first payment, must be made by no later than the last day of that year of assessment.

2.3.3. In order to assist with alleviating cash flow burdens arising as a result of the COVID-19 pandemic, the following tax measures are proposed for qualifying provisional taxpayers, for a period of twelve months, beginning 1 April 2020 and ending on 31 March 2021:

2.3.3.1. Deferral of a portion of the payment of the first and second provisional tax liabilities to SARS, without SARS imposing

administrative penalties and interest for the late payment of the deferred amount.

2.3.3.2. The first provisional tax payment due from 1 April 2020 to 30 September 2020 will be based on 15% of the estimated total tax liability, while the second provisional tax payment from 1 April 2020 to 31 March 2021 will be based on 65% of the estimated total tax liability, reduced by the first provisional tax payment.

2.3.3.3. Provisional taxpayers will be required to pay deferred provisional tax payments by the effective date, referred to in section 89*quat* of the ITA, by when additional provisional tax payments (generally referred to as the third 'top up' provisional tax payment) may be made under paragraph 23A(1) of the Fourth Schedule, for the year of assessment to which the deferred payments relate.

2.3.4. For the purposes of this proposal, small or medium sized business means a business conducted by a company, individual or trust with a gross income not exceeding R100 million for the year of assessment ending on or after 1 April 2020 but before 1 April 2021, where such gross income does not include more than 20% in aggregate of interest, dividends, foreign dividends, royalties, rental from letting fixed property, annuities and any remuneration received from an employer. Rental from letting fixed property is not considered for the purposes of this test if the primary trading activity of the company, trust or individual is the letting of fixed property and substantially the whole of the gross income is rental from fixed property. The requirement that the gross income of the business must not exceed R100 million for the year of assessment will be deemed to have been met if the Commissioner is satisfied that the taxpayer's estimate of the gross income for the year of assessment, when relying on a deferral under the Act, during the year of assessment, was seriously calculated with due regard to the factors having a bearing thereon and was not deliberately or negligently understated.

2.3.5. The following sanctions are applicable to provisional tax:

2.3.5.1. Paragraph 27 of the Fourth Schedule to the ITA makes provision for a 10% penalty for late payment of a provisional tax liability for both the first and second provisional tax periods. Relief from this penalty will be provided in respect of the deferred amounts of provisional tax.

2.3.5.2. Paragraph 20 of the Fourth Schedule to the ITA makes provision for a penalty on the underpayment of a liability in respect of the second provisional tax period as a result of underestimation of taxable income for the year of assessment, reduced by any penalty imposed in terms of paragraph 27 of the Fourth Schedule. This penalty will still apply as the estimation of the provisional tax liability must still be correct, although only in respect of the reduced amount that needs to be paid if the deferral is used. The normal provisions in respect of an underestimation penalty will apply.

2.3.6. Section 89*bis* of the ITA provides for interest on the unpaid portion of a provisional tax liability. Relief from this interest on the deferred amounts will be provided.

2.3.7. The above-mentioned proposals will not apply to a provisional taxpayer that—

2.3.7.1. has failed to submit any return, as defined in section 1 of the TAA, as required by section 25 of the TAA; or

2.3.7.2. has any outstanding tax debt, as defined in section 1 of the TAA, but excluding a tax debt—

2.3.7.2.1. in respect of which an agreement has been entered into in accordance with section 167 or 204 of the TAA;

2.3.7.2.2. that has been suspended in terms of section 164 of the TAA; or

2.3.7.2.3. that does not exceed the amount referred to in section 169(4) of the TAA.

2.3.8. However, penalties and interest will apply in instances where, upon assessment, it is discovered that a taxpayer does not qualify for relief under the proposed amendments. The usual procedures for requests for remittance of such penalties will be available in such cases.

2.3.9. **Examples**

The simplified examples below deal with two companies with different financial year-ends (FYEs).

Example 1:

- Company A has a 30 June 2020 FYE. It would already have paid its first provisional tax payment of approximately 50% (of its estimated total tax liability, say R3 million) by 31 December 2019
- Its second provisional payment is payable by 30 June 2020 — during the period of the temporary relief measure. Instead of paying a further R1.5 million (50%) based on the current legislation, it need only pay R450 000 (15% of R3 million) so that the cumulative total of the first and second provisional tax payments is 65% of the estimated total tax liability (as opposed to the targeted 100%)
- This will provide Company A with a R1 050 000 cash flow benefit during the temporary relief period. Normally, it would have until 31 December 2020 to pay a (usually small) third top-up amount to avoid an interest charge. This relief measure will allow the company to pay the outstanding balance (35% or R1 050 000) by this date.

Example 2:

- Company B has a 28 February 2021 FYE, meaning that its first provisional tax payment falls during the period of the temporary relief measures. As such, the first provisional tax payment (due and payable by 31 August 2020) is R120 000 (15% of its estimated total tax liability of R800 000 for the year) instead of R400 000, allowing temporary relief of R280 000. As a further relief measure only 50% of the estimated tax liability (R400 000) will be due and payable by 28 February 2021, so that the cumulative total tax paid at that point is 65% of the estimated total tax liability. The remaining balance of R280 000 (35% of estimated tax liability) will be due and payable by 30 September 2021 in order to avoid interest charges.

The table below provides an illustrative example of the calculation of the provisional deferral for Company A and Company B.

Table: Calculation of deferral for Company A & Company B

Company A	FYE	estimated tax liablity	P1	P2	P3	Total provisional tax
	30-Jun-20	3 000 000	31-Dec-19	30-Jun-20	31-Dec-20	
	current law		*50%*	*50%*	*0%*	
			1 500 000	1 500 000	-	3 000 000
	temporary relief		*50%*	*15%*	*35%*	
			1 500 000	450 000	1 050 000	3 000 000
	cash flow relief			**1 050 000**		

Company B	FYE	estimated tax liablity	P1	P2	P3	Total provisional tax
	28-Feb-21	800 000	31-Aug-20	28-Feb-21	30-Sep-21	
	current law		*50%*	*50%*	*0%*	
			400 000	400 000	-	800000
	temporary relief		*15%*	*50%*	*35%*	
			120 000	400 000	280 000	800000
	cash flow relief		**280 000**			

2.3.10. The proposed amendments are deemed to have come into operation on 1 April 2020. They apply to first provisional tax periods ending on or after 1 April 2020 but before 1 October 2020 and to second provisional tax periods ending on or after 1 April 2020 but before 1 April 2021.

2.4. CLAUSE 4: DEFERRAL OF INTERIM PAYMENTS BY MICRO BUSINESSES

2.4.1. Similar relief to the 15% and 65% relief with regard to provisional tax payments is provided for qualifying micro businesses with regard to interim payments payable in terms of paragraph 11 of the Sixth Schedule to the ITA.

2.4.2. In terms of paragraph 11(6) of the Sixth Schedule to the ITA, penalty relief will be granted on the deferred interim payments and no interest under paragraph 11(3) or (5) of the Sixth Schedule will be levied on deferred interim payments that are payable on assessment.

2.4.3. The above-mentioned proposals will not apply to a micro business that—

2.4.3.1. has failed to submit any return, as defined in section 1 of the TAA, as required by section 25 of the TAA; or

2.4.3.2. has any outstanding tax debt, as defined in section 1 of the TAA, but excluding a tax debt—

2.4.3.2.1. in respect of which an agreement has been entered into in accordance with section 167 or 204 of the TAA;

2.4.3.2.2. that has been suspended in terms of section 164 of the TAA; or

2.4.3.2.3. that does not exceed the amount referred to in section 169(4) of the TAA.

2.4.4. However, penalties and interest will apply in instances where, upon assessment, it is discovered that a micro business does not qualify for relief under the proposed amendments. The usual procedures for requests for remittance of such penalties will be available in such cases.

2.5. CLAUSE 5: DONATIONS TO SOLIDARITY FUND

2.5.1. The COVID-19 pandemic has led to the establishment of the Solidarity Fund to provide relief focused on the impact of COVID-19. The Solidarity Fund is an approved Public Benefit Organisation that has also been approved under section 18A of the ITA. Donations to this fund, therefore, qualify for a deduction in determining the donor's taxable income. Due to the exceptional circumstances presented by the COVID-19 pandemic South Africans have been called upon to contribute to the Solidarity Fund.

2.5.2. The President stated, in his address to the nation on 9 April 2020, that a range of office bearers would take a one-third cut in their salaries for three months and that this portion of their salaries would be donated to the Solidarity Fund. A number of private sector entities have subsequently indicated that they would be following suit. While it is often open to employers and employees to renegotiate employment contracts, so that the relevant amounts do not accrue to the employees for tax purposes, this is not always possible. Where this is not possible, donations to the Solidarity Fund for which a section 18A receipt has been issued may be taken into account on assessment.

2.5.3. In order to assist with payroll giving initiatives, paragraph 2(4)*(f)* of the Fourth Schedule to the ITA currently permits donations of up to 5% of remuneration to be taken into account for employees' tax purposes where an employer deducts and pays over donations on the employees' behalf.

2.5.4. To alleviate the cash flow difficulties of employees where their employers deduct and pay over their donations to the Solidarity Fund on their behalf, Government is proposing a special relief measure by temporarily increasing the current 5% deductibility limit in the calculation of monthly PAYE of the employee. An additional limit of up to a maximum of 33.3% for three months or 16.66% for six months, depending on an employee's level of donations, will be available over and above the current 5% deductibility limit.

2.5.5. This will ensure that the employee gets the deduction that is in excess of 5% much earlier than under normal circumstances and the employee will therefore not have to wait until final assessment to claim a potential refund, provided the donation is made to the Solidarity Fund. It is, however, important to note that a final determination must still be made upon assessment as the employee may have other income, deductions or losses that impact the final taxable income before the deduction of donations.

2.5.6. The proposed amendments are deemed to have come into operation on 1 April 2020 and apply until 30 September 2020.

2.6. CLAUSE 6: CHANGE IN VALUE-ADDED TAX CATEGORY

2.6.1. Vendors are required to submit VAT returns and account for VAT according to the tax period that has been allocated to the vendor by SARS. In terms of section 27 of the Value-Added Tax Act, 1991 (the VAT Act), vendors are generally required to register for VAT under Category A or B which provide for returns to be submitted bi-monthly i.e. the vendor submits one return for every two calendar months.

2.6.2. The exceptions are vendors that fall under Category C, D or E. Vendors registered under Category C file returns and account for VAT

on a monthly basis. This category is generally applicable to vendors making taxable supplies of over R30 million per annum.

2.6.3. In terms of section 27(3)*(b)* of the VAT Act a vendor may apply in writing to SARS to be registered under Category C, thereby permitting such vendor to file and account for VAT on a monthly basis. This change in category must be effected via an application that must be made to SARS by the vendor in writing. This approach provides vendors with the option of changing their filing category to monthly.

2.6.4. In order to assist businesses, the proposal is to temporarily permit vendors to file their returns monthly (without the need to apply in writing to the Commissioner), while still technically remaining under Category A or B. This option will be made available to all Category A and B vendors who may choose to temporarily file their VAT returns monthly or continue to file bi-monthly returns. The purpose of the measure is to assist businesses with liquidity by filing VAT returns more frequently to expedite potential refunds.

2.6.5. It is proposed that this filing option be effective for a limited maximum of four tax periods. After this period, vendors registered under Category A or B will no longer be able to file returns on a monthly basis, unless such vendor makes an application to SARS for a change in category in terms of section 27(3)*(b)* of the VAT Act.

2.6.6. Category A vendors will be permitted to file monthly returns for the April and May tax periods and June and July 2020 tax periods, should such vendor choose to do so. Category B vendors will be permitted to file monthly returns for the May and June tax periods and July 2020 tax period, should such vendor choose to do so. Should a Category B vendor choose to file a monthly return for July 2020, a monthly return for August 2020 will be required to return the vendor to the normal bi-monthly return cycle.

2.6.7. The proposed amendments are deemed to have come into operation on 1 April 2020 and relate to the tax periods discussed in 2.6.5. and 2.6.6.

2.7. **CLAUSE 7: EXTENSION OF TIME PERIODS**

2.7.1. Clause 7(1) — this clause provides which time periods prescribed under the tax Acts are affected by the COVID-19 lockdown period. In respect of the listed periods, the lockdown period will be regarded as *dies non*, i.e. a day that has no legal effect and which will not be counted for purposes of the calculation of the listed time periods. This is intended to provide individuals and businesses impacted by COVID-19 with additional time to comply with selected tax obligations or due dates that are affected by or fall within the lockdown period but does not extend to return filing or payments. The processes made available by SARS must be followed for requests for instalment payment agreements in terms of section 167 of the TAA.

2.7.2. Clause 7(2) — This clause deals with time periods prescribed under the Customs and Excise Act.

2.7.2.1. Paragraph *(a)*(i) provides for the time periods in respect of which the period of lockdown will be regarded as *dies non*, i.e. a day that has no legal effect and which will not be counted for purposes of the calculation of the relevant time period. This is intended to provide individuals and businesses impacted by the lockdown with additional time to comply with time periods prescribed in relation to certain activities or requirements in terms of the Act. Paragraph *(a)*(ii) sets out

the time periods in respect of which the *dies non* provision does not apply.

2.7.2.2. Paragraph *(b)* read with *(c)* makes provision for time periods not mentioned in paragraph *(a)*(i), and that are not specifically excluded in paragraph *(a)*(ii). A person who did not comply with such a time period may apply for condonation if it can be shown that the lockdown or any circumstance arising from the lockdown was the fundamental reason for the person's inability to comply with the relevant time period. A person can however not rely on the condonation provision if the Commissioner may in terms of the provision prescribing the time period extend that period. In such a case the person must obtain an extension from the Commissioner *before* expiry of the period. The condonation provision applies to non-compliance with a time period occurring after the start of the lockdown.

2.7.3. Clause 7(3) — the Taxation Laws Administration Act, 2019, introduced the 5-year validity period of beneficial owner declaration forms for South Africa withholding tax purposes. In terms of sections 3(2), 4(2), 6(2), 7(2) and 8(2) of the Act, it comes into effect on 1 July 2020. Given the effective deadline date of 1 July 2020 and the impact of COVID-19 measures internationally and locally, in particular the lockdown, this date is extended for three months to 1 October 2020.

2.8. **CLAUSE 8: SHORT TITLE AND COMMENCEMENT**

2.8.1. Save in so far as is otherwise provided for in this Act, or the context otherwise indicates, the amendments effected by this Act come into operation on 1 April 2020.

2.8.2. This means:

2.8.2.1. Clause 2 comes into operation on 1 April 2020 and will cease to have effect on 5 February 2021 for compliant taxpayers.

2.8.2.2. Clause 3 comes into operation on 1 April 2020 and will cease to have effect on the date the provisions of clause 3(2) have been complied with, in view of the different year ends and different time periods for the third top up payment.

2.8.2.3. Clause 4 comes into operation on 1 April 2020 and will cease to have effect when the assessed taxes are paid.

2.8.2.4. Clause 5 comes into operation on 1 April 2020 and applies until 30 September 2020.

2.8.2.5. Clause 6 comes into operation on 1 April 2020 and relates to the tax periods discussed in 2.6.6. and 2.6.7.

2.8.2.6. Clause 7 comes into operation on 1 April 2020 and will cease to have effect when lockdown, as defined, ends, except for clauses 7(2)*(b)* and 7(3).

3. ORGANISATIONS AND INSTITUTIONS CONSULTED

The amendments proposed by this Bill were published on both SARS and the National Treasury's websites for public comment. Comments by interested parties were considered. Accordingly, the general public and institutions at large have been consulted in preparing the Bill.

4. FINANCIAL IMPLICATIONS OF BILL

The financial implications of the tax relief measures were first announced by the President of the Republic of South Africa on 23 March 2020, in his speech on the Escalation of Measures to Combat COVID-19 and further elaborated by the Minister of Finance on 29 March 2020. Further financial implications for further tax relief measures were again announced by the President of the Republic of South Africa on 21 April 2020 and further elaborated by the Minister of Finance on 24 April 2020.

5. PARLIAMENTARY PROCEDURE

5.1 The Constitution prescribes the classification of Bills, therefore a Bill must be correctly classified otherwise it will be constitutionally out of order. The Bill was considered against the provisions of the Constitution relating to the tagging of Bills, and against the functional areas listed in Schedule 4 (functional areas of concurrent national and provincial legislative competence) and Schedule 5 (functional areas of exclusive provincial legislative competence) to the Constitution.

5.2 For the purposes of tagging, the constitutional court case of *Tongoane and Others v Minister for Agriculture and Land Affairs and Others Case CCT 100/09 [2010] ZACC 10,* confirmed the ''substantial measure'' test indicated in *Ex Parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill Case CCT 12/999 [1999) ZACC 15.* The test entails that ''any Bill whose provisions in substantial measure'' fall within a specific Schedule must be classified in terms of that Schedule.

5.3 The issue to be determined is whether the proposed amendments as contained in the Bill, in substantial measure, fall within a functional area listed in Schedule 4 or 5 to the Constitution. The provisions of the Bill have been carefully examined to establish whether, in substantial measure, they fall within any of the functional areas listed in Schedule 4 or 5 to the Constitution.

5.4 A Bill falling within a functional area listed in Schedule 4 to the Constitution must be dealt with in accordance with the procedure set out in section 76. Schedule 4 lists the functional areas of concurrent national and provincial legislative competence. Schedule 5 to the Constitution lists the functional areas of exclusive provincial legislative competence. Therefore, those areas not falling within Schedule 4 and Schedule 5 fall within the exclusive national legislative competence.

5.5 The test for the classification of a Bill, as established in the Constitutional Court judgment of *Tongoane and Others v National Minister for Agriculture and Land Affairs and Others* is that any Bill with provisions which in ''substantial measure'' fall within a functional area listed in Schedule 4 to the Constitution must be classified in terms of that Schedule. The judgment of *Tongoane and Others v National Minister for Agriculture and Land Affairs and Others* therefore laid down the substantial measures test for the tagging of a Bill which requires one to determine whether to a substantial extent the legislation under consideration actually regulates matters falling within Schedule 4 to the Constitution. If so, the Bill must be tagged in terms of section 76 of the Constitution.

5.6 As the Bill does not deal with a functional area listed in Schedule 4 or Schedule 5 to the Constitution, section 44(1)*(a)*(ii) of the Constitution is applicable with regard to the power of the National Assembly to pass legislation on ''any matter''. It is therefore the opinion of the State Law Advisers and the National Treasury that the Bill must be dealt with in accordance with the legislative procedure outlined in section 75 of the Constitution as it contains no provisions to which the procedure set out in section 74 or 76 of the Constitution applies.

5.7 The Department and the State Law Advisers are of the opinion that it is not necessary to refer this Bill to the National House of Traditional Leaders in terms of section 18(1)*(a)* of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003), since it does not contain provisions pertaining to customary law or customs of traditional communities.

Printed by Creda Communications

ISBN 978-1-4850-0646-6