ROAD USER CHARGING SYSTEM REVIEW

PART A: REVIEW OF LEGISLATION

REPORT
ON
STRENGTHS AND WEAKNESSES OF RFA LEGISLATION
AND
CONFLICTS BETWEEN RFA ACT AND OTHER LAWS

FINAL REPORT

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ROAD USER CHARGING SYSTEM REVIEW - PART A: REVIEW OF LEGISLATION

STRENGTHS, WEAKNESSES AND CONFLICTS REPORT

(Deliverables 2 and 3 in terms of the ToR)

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STRENGTHS AND WEAKNESSES OF RFA LEGISLATION AND POSSIBLE CONFLICTS WITH OTHER LEGISLATION

EXECUTIVE SUMMARY

INTRODUCTION

Purpose

This purpose of this Report (referred to as the "Strengths, Weaknesses and Conflicts Report") is to provide a legal opinion on the strengths and weaknesses of the RFA legislation and on conflicts between the RFA Act and other legislation. Amendments to legislation and regulations will form part of the next phase of this Project and will be commenced following guidance from the Client based on this Report.

General approach to the review of the legislation, amendments and regulations

Laws are instruments to implement policies accepted by Government and policies have been used as points of departure to ascertain whether the provisions of the RFA do in fact give effect to the policies approved by Government. It has been necessary in a number of instances to develop or question existing policies. The recommendations in this Report aim at amendments to the RFA Act which are absolutely necessary. The view expressed in this Report is that regulations should be promulgated where necessary, subject thereto that the provisions of the Act provide the necessary authorisation.

Basic policies of the Road Sector Reform

The basic policies of the Road Sector Reform were spelt out in the ToR for this Project. They represent an ambitious attempt to ensure that Namibia's road sector will perform efficiently, in particular that the national road network will be adequately funded. Paragraph 2 of this Report briefly revisits the basic policies and in particular confirms the RFA's dual role in "regulating" road funding in terms of economic efficiency principles and "providing" funding through its management of the road user charging system based on the "user pay" principle. In general, these policies are in line with the Government of Namibia's obligations under the SADC Protocol on Transport, Communications and Meteorology of which it is a member state.

The above dual role explains why the RFA must initially make its "amount of funding" determinations, irrespective of available revenue, in order to determine the "target", "optimum" or "economically efficient" funding level before it makes its "manner of funding determinations" (the latter being the actual funding it will provide). It is important that the "target" funding level should always remain a prominent part of any reporting by the RFA in order that its performance in terms of its basic mandate can be assessed. This is an issue which is addressed in paragraph 6 of the Report. Actual funding provided by the RFA and the rates of road user charges are in the longer-term two sides of the same coin although loan funding can be used to temporarily bridge funding shortfalls.

Some of the major constraints and issues which have arisen are the quantification of the real, long term, stable and "economically efficient" level of funding to be raised through road user charges, the development of generally acceptable, practicable definitions of "economically efficient" and the implementation of equitable road user charges which are sufficient to raise the required revenue. The opposition to increases in the rates of fuel levies from the side of the Ministry of Mines and Energy is one of the issues in this Report (see paragraph 3.1). This issue must be resolved at the policy level rather than at the legal level, and is expected to be one of the more serious issues addressed as part of the RUCS Review.

CONFLICTS BETWEEN THE RFA ACT AND PPE ACT

The RFA Act empowers the RFA to determine road user levies on petrol and diesel fuel but the Petroleum Products and Energy Act (PPE Act) empowers the Minister of Mines and Energy to set the selling price of these fuels. This Report investigates the apparent conflict between the two Acts.

From a strictly legal point of view the Report finds that, although the policy is that the RFA should be able to impose road user charges which will enable it to raise sufficient revenue to ensure an economically efficient road sector, the present legislation is not sufficiently clear with regard to various issues such as the procedures for imposing and collecting fuel levies. The consequences of the uncertainty are such to justify further study and investigation. The conclusion is that it would be prudent to provide more clarity with regard to such aspects and, if required, to spell out by way of amendments to the Act the procedures and obligations for actually imposing, collecting and making available to the RFA, all the levies on fuel that the Administration decides to impose.

However, the view expressed in this Report is that this matter will not be resolved by way of legal interpretation. Ultimately, this is an issue to be resolved at the policy level. Government has accepted a definite policy with regard to the funding arrangements for the road sector in Namibia. The RFA has been established as a creature of statute as part of this policy and with a definite mandate and powers to implement Government's policy. If the RFA is unable to implement road user charges necessary to raise the revenue required to ensure the achievement of an economically efficient road sector, it will not be able to comply with its basic mandate. A failure to adjust fuel levies will oblige the RFA to adjust the rates of other road user charging instruments, take recourse to loan funding (at most a temporary solution) or to adjust its total road funding programme downwards with consequential implications for the economic efficiency of the Namibian road sector. This would be in conflict with Government's declared policy.

The Report's recommendation is that, if there is continued opposition from the Minister of Mines and Energy to increases in the rates of road user fuel levies or the RFA's power to implement such levies, the matter should be referred to Cabinet to confirm the basic road sector policies. The Report further recommends that in approaching Cabinet, the RFA should: (a) set out the basic road user charging system policies, (b) draw attention to mechanisms by which the road sector funding programmes may be taken under review, and (c) adequately substantiate and quantitatively define its funding requirements. In this regard the RFA's study under Part B of the RUCS Review, namely the MIEERS Project, should be used to provide quantitative and qualitative substantiation of the importance of the need to optimally fund the national road network and, especially, the economic implications for the national cost of road transport if road-funding programmes are not implemented timeously.

CONFLICTS BETWEEN RFA ACT AND RTT ACT

Vehicle registration and licensing fees

Both the RFA Act and the Road Traffic and Transport Act (RTT Act) contain provisions with regard to the imposition of vehicle registration and annual licensing fees.

Because this problem concerning duplication was known in the early stages, this situation has not yet given rise to the double levying of these fees. Currently the RFA sets the rates of and receives the revenue from vehicle registration and licence fees. However, vehicle registration and licence fees should be dealt with from the perspective of each of the above-mentioned Acts.

The Minister responsible for transport is responsible for the quality regulation of road traffic and transport. The basis of the quality regulatory system is the vehicle registration and licensing system which ensures that details of all vehicles using public roads are placed on record. "Licensing" authorises the use of a motor vehicle on public roads and the fees which the Minister may impose under the RTT Act acts as a "user charge" to cover registration and administrative costs.

In terms of section 18 (1)(c) of the RFA Act, a road user charge is imposed in accordance with cost recovery, equity, efficiency and non-discrimination objectives in mind. The RFA does not necessarily need to distinguish between "registration" and "licensing". Registration and annual licence fees are therefore a single road user charge which is paid once a year. It constitutes a so-called "fixed" type cost charge in comparison to "variable" or "consumption" type charges which are paid on a per kilometre basis (such as the levies on fuel consumption and the charges on a vehicle's travelling distance). The RFA therefore is of the view that it should have the power to establish an own vehicle register as an administrative tool for the purpose of collecting road user charges and impose annual licence fees as a road user charge in accordance with criteria determined by the RFA. These may be different from the licence fee criteria used by the Minister in terms of the RTT Act.

The RFA has indicated that it believes that, from a strictly legal point of view, no conflict exists between the RFA and RTT Acts with regard to registration and licence fees. The main problem is seen as the fact that the use

of the same terminology in the RFA Act and RTT Act could become confusing to the public.

The view of this Report is that the RFA's view in the above regard is correct but that there are several reasons why the apparent conflict should be addressed by appropriate amendments to either one or both the Acts. These reasons include the fact that it cannot be assumed that the two parties would in future always have the same objectives, that different criteria with regard to the granting of exemptions may apply, that different names for the two types of fees/charges should be found to avoid confusion, that the vehicle classification system (although they should preferably be the same) may be different and, finally, that the interests of both parties as well as of road users would be better served if the two Acts are each focused on their own objectives while at the same time providing for cooperative procedures for the collection and imposition of the respective fees/charges.

Various practical issues need to be addressed at the detail level, *inter alia*, which registers should be kept by the different parties, the vehicle classification system to be adopted, the name to be selected for the "fixed" annual road user charge on vehicles registered in Namibia under the RFA Act, the arrangements for imposing the fees and road user charges (regulations and notices in terms of the *Gazette*), the arrangements to collect the relevant fees and road user charges and the disposal of fees and road user charges revenues, the documentation required for each road user charge and fee, and whether the system of mass-distance charges (MDCs) could be operated as part of the registration and licensing fee.

It was not possible within the scope of this Report to make final proposals with regard to the amendments to be made to the RFA Act and RTT Act. Such proposals will depend on further discussions between the RFA and the Ministry of Works, Transport and Communication.

Fines for the overloading of vehicles

Both the RTT Act and the RFA Act contain provisions dealing with the disposal of overload fines. According to section 16((1)(i) of the RFA Act such fines should be paid into the Road Fund. The RTT Act requires the revenue from all fines to be paid into the State Revenue Fund.

According to Adv J Botha, who submitted a legal opinion of the matter, the provisions of the RTT Act should be regarded as prevailing over those of the RFA Act and that all fine revenues, including those from overloading fines, should be paid into the State Revenue Fund. The view expressed in this Report is that the above interpretation could be challenged on the grounds that the RFA Act has the more specific provisions relating to *overloading* fines as opposed to the general provisions of the RTT Act relating to all fines. However, the RFA has indicated that it does not wish to make a strong case that the relevant fine revenues should accrue to the Road Fund (possibly for reasons related to the funding responsibilities with regard to traffic regulatory functions which may by imp lication accrue to the RFA should it lay claim to such revenues.). It is not recommended that this issue be further pursued.

Abnormal Vehicle Fees and Mass-Distance Charges

The provisions of the RFA Act and the RTT Act would appear to be in conflict. Abnormal load and abnormal vehicle fees are currently imposed and collected by the Roads Authority (RA) in terms of the regulations under the Road Traffic and Transport Act (RTT Act). However, such fees are also road user charges in terms of the RFA Act.

The charges which would normally be imposed under section 18(1)(a) of the RFA Act are the so-called "mass-distance charges" (MDCs), sometimes also referred to as "weight-distance charges", on heavy and very heavy vehicles. This provision of the RFA Act applies equally to the road user costs associated with "ordinary" heavy vehicles and "abnormal", or "abnormally loaded", heavy vehicles. In both cases it constitutes a road user charge which should be set to recover road "consumption" costs associated with the use of the road by the vehicle concerned. Therefore, MDCs and abnormal load charges are conceptually very similar.

When the RA (on behalf of the Minister responsible for transport) imposes fees in terms of the RTT Act, its purpose is, in the first instance, to authorise the use of the vehicles concerned (i.e. for road traffic quality regulatory purposes) rather than to impose a user charge.

From a policy point of view the RFA should seek to impose road use (cost recovery) charges associated with the use of the national road network by vehicles. Mass-distance charges (MDCs) are necessary as additional (to vehicle registration and licence fees and fuel levies) road user charges on heavy and very heavy vehicles to

ensure equity between very heavy vehicles and other vehicles. Similarly, the RFA should charge abnormal and abnormally loaded vehicles in a way which will ensure equity. The RFA has to date not attempted to implement MDCs. The main reason has been the technical difficulties in measuring the distances travelled by heavy vehicles.

Both the Minister responsible for transport and the RFA should continue to be able to impose fees/charges in accordance with their respective responsibilities.

According to the view expressed in this Report the provisions of the RFA Act and RTT Act are not in conflict. It would, however, be impractical and cumbersome if owners of heavy vehicles were required to pay the relevant permit fee in terms of the RTT Act and the road user charge in terms of the RFA Act separately. The matter should be resolved along similar lines as proposed for the vehicle registration and licensing fees and road user charges.

The RFA should resolve technical and other issues with the Minister of Works, Transport and Communication and the RA before deciding on the way in which it will implement abnormal load charges. However, section 18 of the RFA Act should be amended to spell out the RFA's powers to implement the necessary administrative system for a MDC levy in stronger terms and section 18(7) should be amended to extend the current flexibility provisions of that section to all forms of road user charges and to include for the principle of assumptions/presumptions for purposes of dealing with cases where travelling distances may have to be based on assumptions rather than actual measurement.

REVIEW OF THE RFA ACT AND IDENTIFICATION OF AMENDMENTS

General

In paragraph 5 of the Report weaknesses in the RFA Act are identified and amendments proposed. The actual drafting of amendments will be undertaken as part of the next phase of this Project following consideration of the proposals in this Report by the Client. The view of this Report is that regulations should be used where any issue must be addressed in detail and that in such cases appropriate empowering provisions should be provided in the principal Act.

Regulations for the implementation of mass-distance charges (MDCs) will be addressed as part of the next phase following the outcome of the work under Part of C of the RUCS Review.

Primary legal issues involving the RFA Act

Definition of "road sector"

The expression "road sector" is used throughout the Act. Both the RFA and the RA have mandates which refer to the achievement of safety and efficiency objectives related to the "road sector". The issue is whether a formal definition of this concept is required, specifically because parties dependent on the RFA for funding may wish to apply to the RFA to provide funding for expenditures which are claimed to impact on the efficiency of the "road sector" in general.

The finding of the Consultants is that the types of expenditure for which the Road Fund may be used are adequately defined in section 17(1) of the RFA Act and that "road sector" as a broad concept should be left intact in order to do full justice to the object of the RFA Act. Attempts to define the concept "road sector" may create problems where none have yet arisen. The recommendation is that no definition of "road sector" be included in the RFA Act.

Definition of "safe road sector"

The possible need for a definition of "safe" in relation to the "road sector" arises from expressed views that the RFA is statutorily responsible for road traffic safety and hence also responsible to provide funding for functions such as traffic law enforcement.

The RFA has to date interpreted its responsibility to provide funding for traffic law enforcement as being subject to the same basic principles which are applied to the funding of other functions/expenditures, namely that

economic efficiency principles should apply and, further, that funding at any specific point in time is dependent on availability of funds.

In this regard it is noted that the only specific obligations imposed on the RFA with respect to the quantum of funding to be provided for purposes of the achievement of any "safety-related" objective are those in terms of section 19(1)(a)(ii) of the RFA Act, which refer to compliance by the Roads Authority with the (minimum) road standards and measures prescribed under section 16(5) of the Roads Authority Act.

The view expressed in this Report is that the RFA Act does not place a specific obligation on the RFA with regard to traffic safety as such, specifically not the achievement of any defined road traffic safety standard. Furthermore, the RFA must frame the rules and principles to be followed by approved authorities in applying for funding. Any issues with regard to the funding to be provided by the RFA for road sector "safety" related expenditures can therefore be dealt with *via* the relevant rules and principles and the process of consultation preceding the acceptance of such rules and principles. It is therefore not recommended that a definition of "safe" in relation to the road sector be provided in the Act.

Section 17 (1) of the RFA Act: funding of infrastructure and non-infrastructure (traffic) functions

Section 17(1) of the Act deals with the expenditures for which the Road Fund may be used. Two issues were initially identified to be addressed, namely (a) the interpretation to be attached to the expression "to the extent that it is to the benefit of road users" – should this be interpreted as indicative of a rule for determining the quantum of funding, and (b) the implications for funding when words such as "to defray the costs of" are used in comparison to words such as "to make contributions towards".

The conclusion is reached that the expression "to the extent that it is to the benefit of road users" can, on a strict interpretation, only be applied in respect of the "types" of expenditure for which the Road Fund may be utilised, this being the subject of section 17. Amount of funding determinations are clearly the subject of section 19 of the Act. The terminology used in the Act should, however, not lead to confusion and the Act should therefore preferably, and if the opportunity arises, be amended. As far as the words "defray" and "make a contribution " are concerned the conclusion is that they should not appear in the various paragraphs of section 17(1) but, if retained, be reformulated as "quantum-like" provisions (which they really are) and incorporated under section 19.

A further issue, later identified, was that section 17 does not cover all expenditures for which the Road Fund may have to be utilised and a further expenditure heading is proposed, namely for claims against the Administration (cf. the similar provision in respect of claims against the RA). The Client also requested that the qualification "traffic related" in relation to urban road maintenance (see section 17(1)(c)(ii) of the Act) be explicitly defined so as to ensure that funding for this expenditure will clearly be restricted to the economically efficient repair of "wear and tear" caused by vehicular traffic.

Section 17 (2) of the RFA Act

Section 17(2) of the Act both requires and empowers the RFA to determine the "*types and maximum amounts of expenditure*" which may be incurred with regard to the funding of most of the expenditures under section 17(1). The exceptions are the funding for the management of the national road network and the RFA's own funding. Section 17(2) determinations supersede even the provisions of section 19 requiring compliance with the economic efficiency principle.

The first problem with the present section 17(2) is that it deals with both "type" and "quantum" of funding determinations while the latter (see above) is a section 19 matter. The second problem is that section 17(2) deals with "quantum" funding determinations - which touch directly on the RFA's basic funding regulatory function - in a rather arbitrary way. With regard to the first problem the proposal made in the Report is that the part of section 17(2) dealing with the "quantum" of funding should be deleted and moved to section 19. The second problem was given considerable thought and also discussed at a Working Meeting with the Client. The conclusion was that, since this is an important matter affecting directly the RFA's basic funding regulatory function, a less arbitrary procedure for the determination of funding amounts where the economic efficiency principle is difficult to implement in practice – the original intention of section 17(2) – should be provided for in the Act. Detailed proposals for the appropriate amendment of section 19 of the Act, which is the logical place for such provisions, are made in this regard.

Section 19 (1) and (2): "Economic efficiency" of the road sector

The concept "economic efficiency" in relation to the road sector plays a prominent role in the RFA's role of regulation and providing funding. Section 19 of the Act, which deals with the determination of the amount of funding to be provided by the RFA, does not define the concept. The issues are whether this concept should be defined in the Act and to what extent the RFA Act should provide the RFA with discretionary powers to interpret the said concept in instances where its practical application is difficult. A further issue is the possibly conflicting provisions of subparagraphs (i) and (ii) of section 19(1)(a), which require simultaneous compliance with provisions which may be inherently contradictory ("economic efficiency" and "prescribed minimum road standards and measures").

It is recommended that no definition of "economic efficiency" be provided in the Act since the rules and principles under section 19(2) provide an interpretation in this regard. The RFA's discretionary powers to interpret the concept of "economic efficiency" in difficult cases are dealt with by way of a proposed new section 19(3) in the RFA Act (which partially replaces the former section 17(2)) and which creates a procedure whereby such instances can be dealt with (see discussion under paragraph 5.4.2 of the Report). The conflicting provisions of section 19(1)(a) are dealt with in section 5.6.2 of the Report. A policy decision is required in order to appropriately amend the Act.

Section 20(4)(a) and (b): "Amount" and "manner" of funding determinations

Section 20 deals with the budgeting process and in particular with the sequential "amount" and "manner" of funding determinations which the RFA must make in order to comply with the definition of the road user charging system in section 1 of the Act. The definition emphasises that the RFA must make "in principle" or "amount" of funding determinations which comply with the strict interpretation of the economic efficiency principle and then "manner" of funding determinations which are subsequently reflected in the business plan (section 21 of the Act) and which constitutes the RFA's actual budget as opposed to its "theoretical" or "optimum" budget.

One of the specific problems which the Consultants were required to address is the provision in section 20(4)(b) which obliges the RFA to include any "in principle" funding determination it makes under section 20(4)(a) under a five year budget in terms of an appropriate section 20(4)(b) funding allocation. It is not always possible, due to funding constraints, for the RFA to provide funding for all projects which it has approved under section 20(4)(a) within the time frame of a five year budget (or business plan). Section 20(4)(b) should therefore be amended so that approved projects can be funded as and when it is possible, even at a time later than the five year period covered by a business plan.

The above problem has been addressed and a suitable amendment to the Act is proposed in the Report.

During the course of addressing the above issue the provisions of section 20(4)(a) and (b) of the Act were reviewed in some detail and against the background of the experience gained with the budget process during the first four years of the RFA's existence. A number of further issues were identified and these are addressed in the Report. The implications of "in principle" approvals of "projects" and "programmes", respectively, for which no formal definitions are found in the Act, may specifically be mentioned.

Responsibility and powers of the RFA to ensure the efficient use of funds

The RFA required the Consultants to analyse the RFA Act with regard to the powers the RFA has of performing audits, both financial and technical, and of imposing sanctions in the case of a party not complying with the conditions imposed with respect to funding from the Road Fund. Subject to the Consultants' findings and consultation with the RFA, the Consultants should then draft appropriate legislative instruments with the aim of providing the required powers to the RFA."

Section 15(1)(e) of the RFA Act does not explicitly provide the RFA with powers, in the case of the RA, to ensure the efficient use of funds. Such an interpretation relies on an interpretation of section 17 of the RA Act which refers to the "efficient utilisation of funds". The reference in section 15(1)(e) of the RFA Act is also lacking in explicit purpose as far as other approved authorities are concerned. Section 20(5) of the RFA Act empowers the RFA to provide funding subject to conditions determined by it. However, the RFA does not have powers, nor is it practical, to suspend funding when there is non-compliance with the conditions under which

funding is provided. Section 17 of the RA Act, which deals with the procedures agreement between the RFA and the RA, was also found to be ineffective, mainly because it only provides for an assessment of particulars provided by the RA. It does not empower the RFA to insist on a change to any system or procedure proposed in the RA's draft procedures agreement. Section 23 of the RA Act was next investigated since it provides for the lodging and investigation of complaints against the RA, specifically also if it has failed to comply with the provisions of its procedures agreement with the RFA. The proceedings of a complaint investigation are, however, under the control of the Transport Minister. The general conclusion about current road sector legislation is that it tends to confirm a policy that the ultimate responsibility for the efficient performance of the RA vests in the Minister responsible for transport.

Other legislation was investigated. The President may appoint a commission of inquiry in accordance with the Commissions Act, 1947 (Act No. 8 of 1947). This will constitute a very formal and time-consuming procedure. The provisions of the State Finance Act, 1991, seem to provide an avenue whereby the Auditor-General may audit the books of statutory institutions. The RFA could therefore approach the Auditor-General to perform an audit in respect of the RA and other approved authorities such as local authorities that resort under the "jurisdiction" of the Auditor-General by virtue of the provisions of the State Finance Act. The State Owned Enterprises Bill 2004 will apply to the RA once enacted. It does not provide for any specific powers of inspection in connection with State owned enterprises but it is assumed that the SOE Governance Council will act if an appropriate charge concerning alleged irregularities in a State owned enterprise is laid with the Council. The conclusion with regard to the above is that the above-mentioned legislation (especially the State Finance Act) could provide effective mechanisms for investigating the use of funding but the RFA will not be in charge of the procedures.

The powers of the RFA to ensure the efficient use of funds, specifically its powers to undertake audits where is suspects inefficient use or "irregularities" in the use of funds provided by it, would best be addressed by again examining the basic policies of the Road Sector Reform. The basic objective of the Sector is to ensure the "optimum utilization of scarce resources". This basic objective would to a large extent be negated if funds, generated through the road user charging system, are used "inefficiently" or "irregularly". However, both the RFA and the RA have similar responsibilities to ensure efficiency. Both are, however, also autonomous entities and fall under the control of different Ministers. It would entail a definite change in present policy (as reflected by the legislation) if the RFA were to be given more explicit powers to audit, specifically, the RA. This is likely to be controversial. A workable solution would be to provide the RFA with expedient access to procedures whereby financial and technical audits can be referred to suitable functionaries with expertise for such tasks.

At the Working Meeting held from 6 to 8 May 2004 a number of points were raised which suggest that the RFA should have a more prominent role to ensure the efficient use of funds but without necessarily having powers of audit. A stronger monitoring role, including powers to carry out technical inspections, is foreseen. In urgent circumstances, the Auditor-General should be able to carry out ad hoc audits of a beneficiary's books. The provisions relating to the RA's procedures agreement were identified as requiring attention.

Suitable amendments to the legislation will be prepared pending instructions from the Client.

Sections 4 and 14: Appointment of the Board of Directors and the Chief Executive Officer

In this paragraph the Client's concerns about the roles of the Board of Directors ("Board") and the Chief Executive Officer ("CEO") are addressed, specifically whether the directors should in fact be regarded as executive directors, despite them not being involved in the day-to-day management. The Consultants were also requested to advise whether the word "Administration" should not be replaced by the word "Board" in section 14(1) to make it clear that the CEO is employed by the RFA and not the Board. The view expressed in the Report is that the Act does not provide clear guidance regarding the Board's role. It is suggested that this is a matter for a focussed study outside the terms of reference of the RUCS Review. The wording of section 14(1) need not be amended. Legal interpretation confirms that the CEO must be regarded as an employee of the RFA and not the Board. The Board acts on behalf of the RFA when it appoints the CEO.

Section 18: Use of fuels other than diesel and petrol

The possible use of fuel other than petrol or diesel to propel vehicles using public roads (see a recent article in the press which refers to the use of LP Gas as an energy source for vehicles) has raised the question whether the provisions of the RFA Act are adequate to ensure that vehicles so propelled can be made to pay for their "consumptive" road use in the same way as vehicles using conventional sources of fuel.

Section 18 of the RFA Act only provides for levies on petrol and diesel fuel. Although the policies with regard to road use are clear, the current provisions of the Act do not specifically enable road user charging based on consumption of energy sources other than petrol or diesel. However, the provisions of the Act, specifically section 18(1)(a), do permit road user charges based on the travelling distances of vehicles. Levies on fuel consumption are in reality only levies on what is a "proxy" for road use.

The view expressed in this Report is that the RFA Act should as a matter of principle be amended to allow for the imposition of levies on fuels other than petrol and diesel even although there may be practical difficulties with regard to the imposition and collection of such levies.

Additional issues: Section 16: Donor and other funding

During the Working Meeting on 6 to 8 May 2004 the Consultants were requested to address certain difficulties of interpretation in respect of paragraphs (b) ("State funds") and (f) ("donor funds) of section 16(1) of the Act. The Act requires such funding to be paid into the Road Fund. Parliamentary appropriations or donations may not necessarily be intended to be channelled through the Road Fund. Certain amendments are recommended to the Act.

SECONDARY LEGAL ISSUES INVOLVING THE RFA ACT

The Client required the Consultants to address the following "Secondary Legal Issues".

- Principles with regard to the financial management of the Road Fund
- Adequacy of budgeting procedures and business plan
- RFA Performance Statement to the Minister of Finance
- Accountability (financial reporting) of the RFA
- Annual Report
- Legislative requirements regarding consultation with stakeholders
- Dispute and complaints regulations

Some of the above issues have a common theme, namely that they have to do with the RFA's accountability and reporting obligations. The RFA has considerable obligations in this regard in terms of the RFA Act. In terms of the basic philosophy underlying the Road Sector Reform new entities are assumed to be able to perform most effectively if they are (a) given explicit objectives to achieve, (b) are provided with the relevant expertise, (c) have sufficient powers; and (d) can be held accountable for their performance.

The principles for managing the Road Fund are discussed against the background that the road user charging system is unique and that the financial management of the Road Fund comprises both financial management in the conventional sense (i.e. liquidity and solvency aspects) but that the financial position of the Road Fund, especially in a longer term context, is a reflection of the management of the road user charging system to achieve an economically efficient road sector – the basic mandate of the RFA. In referring to the "financial management" of the Road Fund (see section 16(2) of the Act) both the short term financial management aspects, which are amenable to conventional accounting practices, and the longer term management aspects, which it is recommended should be accounted for by way of a "customised" accounting system, are discussed.

A further issue referred to the Consultants was whether the Road Fund should have legal personality. It was found that the Road Fund does not need to be a legal person. It is argued that the Road Fund's assets are ultimately public assets and that moneys should be paid *into* rather than "accrue" to the Road Fund in view of the fact that the Fund is not a legal person. The question whether it is technically possible for the Road Fund to go "bankrupt" is also addressed. An opinion was provided by Prof Erasmus of the Stellenbosch Law Faculty about section 17(5) of the Act which seeks to protect the assets of the Road Fund against attachment or sale. It seems that this provision of the Act is outdated.

The adequacy of the Act's provisions with regard to the budgeting process are reviewed in some depth in paragraph 6.3 of the Report. It is concluded that some amendments to the Act should be considered to ensure greater clarity about certain matters.

The purpose of the RFA's performance statement (section 22 of the Act) is to enable the Minister of Finance to

assess the RFA's performance in a number of critical areas. The view expressed in the Report is that the provisions of the Act relating to the performance statement are adequate.

The Act's provisions with regard to financial reporting and the RFA's annual report (sections 24 and 25 of the Act) are reviewed in paragraphs 6.5 and 6.6 of the Report. The Act requires the accounting records of the RFA to *"reflect fairly the state of affairs and business of the Administration and the Fund and to explain the transactions and financial condition of the Administration and the Fund"*. The conclusion of the Consultants is that it is questionable whether important stakeholders such as the Minister of Finance, the Minister responsible for transport, the Minister of Mines and Energy, the Roads Authority, other approved authorities, potential financing agencies and road users are placed in a position to assess the "state of affairs" and business of the RFA" on the basis of the present reporting formats. This means that effect is not being given to the Road Sector Reform's principle with regard to "accountability". Since the Act does not place any limitations on the information which the RFA may disclose, the RFA should itself decide to implement more appropriate financial reporting practices. Regulations could be promulgated to prescribe more transparent reporting formats.

The provisions of the Act with regard to consultation with stakeholders are discussed in paragraph 6.7 of the Report. The current provisions of the Act are regarded as adequate and even onerous. A few proposals to be considered by the Client are made.

A number of serious problems are identified in paragraph 6.8 of the Report regarding the provisions of the Act dealing with Dispute and Complaints regulations (sections 20(7) to (9) and 28(f) of the Act). This issue was discussed at the Working Meeting held on 6 to 8 May 2004 and was also referred to Prof Gerhard Erasmus. The conclusion expressed in the Report is that a number of policy issues need to be decided and that the relevant provisions of the Act then be amended. The present draft Dispute and Complaints Regulations should not yet be promulgated.

LEGAL ISSUES INVOLVING THE ROADS AUTHORITY ACT

The Consultants were required to limit their work to a brief discussion of issues involved to allow the RFA to make an assessment whether and to what extent it should address these issues with the RA in future consultations. This is done in paragraph 8 of the Report.

A first issue is that it was found that sections 15 and 16 of the RA Act should receive attention. Section 15(1)(c) of the RA Act requires the RA to "advise and assist" the Minister. This does not adequately provide for the performance of full functions such as operation of a traffic information system and the undertaking of other functions of the Minister in terms of the RTT Act. Section 16(1)(f) of the RA Act empowers the Minister responsible for transport to "assign" traffic regulatory functions ("*any purpose relating to road traffic or road transportation*"), in addition to functions necessary to achieve the objects of the RA Act, to the RA. Since the Act does not empower the Minister to act in any other way when he or she wishes to use the RA (as intended as part of the Road Sector Reform policies) and in view of the concerns about section 15(1)(c), the Minister has little option but to "mix" infrastructure and quality regulatory functions by making use of section 16(1)(f). "Assignment" by definition (the wording of the Act) makes "assigned" functions part of the "road management function". There are thus also implications for the funding to be provided by the RFA.

It is recommended that the RFA should further investigate the present issues within the context of the above discussion and, depending on the outcome, approach the RA and the Minister responsible for transport with a view to seeking the amendment of sections 15 and 16 of the RA Act.

A second issue addressed is section 16(5) of the RFA dealing with the prescribing of minimum standards and measures for the management and maintenance of roads. This provision has an effect on the funding to be provided by the RFA under paragraph (ii) of section 19(1)(a) of the RFA Act and may create conflicts between the latter provision and paragraph (ii) thereof. It is recommended that the basic road user charging policies be revisited and that the RA and the RFA Act's relevant provisions then be amended if necessary.

A third issue which is addressed is the transitional provisions pertaining to the Roads Contractor Company (RCC) in section 27(10) of the RA Act. The Act provides for the preferential treatment by the RA of the RCC in the awarding of road construction and maintenance work during the first three years after the "transfer date". Due to an inexact formulation of the provision in section 16(3) of the RA Act, and the power of the RA to enter into contracts concerning the physical work that needs to be carried out in respect of the national road network

(section 16(3), it has been possible to extend the RA's preferential treatment of the RCC after the expiry of the above period of three years. This is a policy matter and no specific recommendation is made in the Report.

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ROAD USER CHARGING SYSTEM REVIEW

PART A: REVIEW OF LEGISLATION

DISCUSSION OF ISSUES AND PROVISION OF LEGAL OPINIONS ON STRENGTHS AND WEAKNESSES OF RFA LEGISLATION AND POSSIBLE CONFLICTS WITH OTHER LEGISLATION

1. INTRODUCTION

1.1. Purpose

This Report (referred to as the "Strengths, Weaknesses and Conflicts Report") combines deliverables 2 and 3 as required by the Client in terms of paragraph 5 of the Terms of Reference ("ToR"), namely:

"2. Legal opinion on the strengths and weaknesses of the RFA legislation with a view to the achievement of the objects of the RFA Act; and

3. Legal opinion on conflicts – real, perceived or potential – between the RFA Act and other legislation."

The Client's prior permission was obtained to combine these deliverables in view thereof that it was thought to be a more efficient and less time consuming approach to combine the two reports, which in essence are closely related.

The basic purpose of deliverable 2 above as set out in paragraph 3.1.1 of the relevant ToR is to:

(a) analyse the RFA and RA Acts;
(b) formulate a critical viewpoint on the strengths and weaknesses of the legislation,
(c) assess to what extent the legislation is suitable for ensuring the achievement of the objectives of the RFA and RA Acts;
(d) identify which deficiencies, if any, require attention; and
(e) prepare the way for the implementation of such amendments to the legislation as may be necessary following the identification of any deficiencies in (d) above.

The purpose of deliverable 3 is set out in paragraphs 3.1.2. and 3.1.3 of the ToR and requires the Consultant to analyse perceived conflicts between -

(a) the RFA Act and the Petroleum Products and Energy Act (PPE Act) regarding the power to set the rates of road user levies on diesel and petrol included in the pump price of fuel and also any other potential conflicts between these Acts, and

(b) the RFA Act and the Road Traffic and Transport Act (RTT Act) regarding the imposition of vehicle registration and licence fees and the disposal of fines imposed on the overloading of vehicles (the latter matter to be investigated in consultation with the Ministry of Works, Transport and Communication),

and, based on guidance and instructions from the RFA, to draft the required amendments to either or both the RFA and RTT Acts, as the case may be (the latter in consultation with the Ministry of Works, Transport and Communication).

The drafting of amendments to legislation, including such amendments to the RFA Act as are necessary to empower the RFA to implement mass-distance charges (MDCs), will form part of deliverable 4 in terms of the ToR. The extent of the required empowerments with regard to MDCs will depend on the recommendations accepted as part of the work to be undertaken under Part C of this Review. In this regard it is noted that the once envisaged use of passive satellite technology[1] to measure the travelling distance of heavy vehicles (see the reference to such a system in paragraph 3.1.4 of the ToR) now appears to have been put on hold and that the extent of regulations for MDCs will depend on the recommendations accepted by the RFA following completion of the work under the above-mentioned Part C. However, we confirm that we envisage to draft suitable wide empowerments for inclusion in the RFA Act as part of deliverable 4 of the ToR for Part A. It will, however, be necessary that the Client advises the Consultant as soon as possible regarding the MDCs regulations so that this part of deliverable 4 can be properly scheduled.

An Inception Report has been delivered to the Client setting out the Consultant's work schedule and preliminary identification of issues involved in the legislative review part of the Project. The comment/input of the Client was obtained on the Inception Report, and a subsequent first Progress Report was presented at a meeting on 10 October 2003.[2] Both were considered for the purposes of this Report.

This Report not only addresses issues raised in the ToR but also includes additional issues identified by the Consultant and issues raised by the Client and other relevant parties such as the Roads Authority. The Consultant, in its Inception Report, provided details of its understanding of the legislative part of the Review Project and set out relevant policies underlying the legislation and issues involved. For purposes of brevity, these details are not always repeated in this Report.

It is understood that the Client wishes to review all relevant legislation in a single exercise (which will include future problems which could arise) in order to avoid a piecemeal approach. Therefore, this Report not only addresses problems currently experienced and existing conflicts, but anticipated and perceived problems and conflicts. Not all of these may be matters that the Client may wish to pursue at this point. In the second part of this Report, these various existing and future issues are set out for the Client's consideration and instructions (in so far as they fall within the scope of our ToR) prior to proceeding with the third leg of the Project).

1.2. Structure of this Report

In view of the guidance given by the Client (see "Guidance to Consultants – November 2003"), this Report is structured somewhat differently than the Inception Report in that the new structure proposed by the Client will be followed:

[1] See the study undertaken in this regard during 2001 for the RFA by Mr Ben Gericke.
[2] Draft Part A: Guidance to Consultants – November 2003.

(i) Constraints experienced by the Client
(ii) Conflicts between the RFA Act and PPE and RTT Acts
(iii) Regulations to be drafted for the implementation of decisions based on the outputs of the RUCs Review
(iv) Primary Legal Issues involving the RFA Act
(v) Secondary Legal Issues involving the RFA Act
(vi) Other External Issues
(vii) Legal Issues involving the Roads Authority Act.

In this Report, however, (iii) above, namely Regulations to be drafted for the implementation of decisions based on the outputs of the RUCS Review, will not receive much attention since information from Part C of the RUCS Review Project is required which is as yet not available. A further report will be provided in this regard if necessary.

1.3. Relevant legislation

The laws scrutinised by the Consultant and relevant to the issues raised in this Report are:

- The Road Fund Administration Act, 1999;
- The Roads Authority Act, 1999;
- The Road Traffic and Transport Act, 1999;
- The Petroleum Products and Energy Act, 1990;
- The Petroleum Products and Energy Amendment Bill 2004; and
- The Road Safety Bill, 2003.

Other sources, particularly those relevant to policy principles relevant to the Road Sector Reform, are mentioned in the References section in Annexure B of this Report.

1.4. General approach to the review of the legislation, amendments and regulations

We have adopted the view that laws should be seen as instruments to implement policies accepted by Government. However, once an Act has been implemented its provisions must be interpreted and given effect to as they stand.

We will therefore use policies as point of departure to ascertain whether the provisions of the RFA Act do in fact give effect to the policies approved by Government. If they do not, we will refer to the relevant policies and propose amendments which will bring the Act into line with policy. Where there are no specific policies with regard to any matter regulated by the Act to guide an assessment whether the Act gives effect to policies, we will interpret the Act in order to define the policy established by the provisions of the Act. We will then discuss policy and, if necessary, develop and formulate policy for the consideration of the Client which we believe is in accordance with the broader policy principles applicable to the matter under discussion. Our eventual recommendations will then be based on such proposed policy as accepted by the Client.

Our recommendations to amend the Act will be guided by the following considerations:

- Amendments to the Act should be limited to what is absolutely necessary; and

- Where it is necessary to ensure that certain procedures are followed to better ensure compliance with policy objectives or the provisions of the Act, we will rather advise that regulations be promulgated, provided that the provisions of the Act provide the necessary authorisation.

2. CONSTRAINTS EXPERIENCED BY THE RFA TO BE ADDRESSED BY LEGISLATION

2.1. General

Comments received on this from the Client are as follows:[3]

"With regard to this, performance constraints could so far not be ascribed purely to definite legal issues; however, this must be seen against the background of the RFA attempting to solve and deal with problems that, especially at this early stage of implementation of the road user charging system, have multiple facets. A significant example is the problem of determining the "optimal" level of funding of the road sector as required for achieving the objects of the RFA Act. This does not, however, allow the conclusion that the RFA might not in future experience certain legal issues, as pointed out in the Terms of Reference, to become a constraint to its performance."

As a basis for addressing the strengths, weaknesses and conflicts of the legislation the basic policies of the Road Sector Reform and some of the challenges which have arisen are briefly reviewed below. More detailed policies and analyses of such policies are provided in the text as necessary.

2.2. Basic policies of the Road Sector Reform

The purpose of the RFA Act is to establish the Road Fund Administration (RFA) to manage the road user charging system. A separate entity, the Roads Authority (RA), was established at the same time in terms of the RA Act to manage the national road network. Ownership of the national road network continues to vest in the Minister responsible for transport.

A road user charging system in general is defined as a system to raise revenue from road users towards defraying the costs of providing and maintaining public roads. While the road user charging system for Namibia complies with this general definition, it is also a system to regulate road funding in terms of economic efficiency principles. The road user charging system is defined in section 1 of the Act as:

"*the system providing for independent regulation of road funding in accordance with economic efficiency criteria and full cost recovery from road users comprising, in sequential order, the following:*

(a) the determination of the amount of funding for road projects and programmes;
(b) the determination of the manner in which such funding shall be allocated;
(c) the determination, and the imposition of, the types and rates of road user charges."

[3] Guidance to Consultants. November 2003.

The elements of the above definition are given further content by specific provisions of the Act.

Section 19, which deals with the determination of the amount of funding for road projects and programmes, provides that in determining the amount of funding the RFA shall ensure the achievement of an economically efficient road sector (subsection 19(1)). "Economically efficient" in relation to the road sector is not defined in the principal Act. The Act, however, in section 19(2) requires the RFA to frame "rules and principles" to be followed in proposing and evaluating road projects and programmes. In effect this empowers the RFA to define "economically efficient" in relation to the road sector. The RFA has chosen to interpret "economically efficient funding" as that level of road funding which reduces total road transportation costs, comprising road infrastructure costs and vehicle operation costs, to a minimum. The definition has the advantage that it complies with the generally accepted approach followed in evaluating road projects and is technically feasible by way of existing computer models. Such models use the fact that given increases in roads expenditure can be demonstrated to bring about quantifiable reductions in vehicle operating costs (also referred to as benefits to road users). These models, although complicated and dependent on empirical data inputs and assumptions about future traffic volumes, construction costs, etc. can be used to justify funding. While the same approach is in theory applicable to the funding of other functions qualifying to be funded out of road user charges, e.g. traffic law enforcement, it is generally not yet possible to in monetary terms quantify the benefits to road users which are associated with a given expenditure level. This has created problems in framing "rules and principles" for the funding of these functions. The RFA has created such rules and principles, but they must of necessity, with the technology and information available at present, rely on discretionary judgement concerning the "value" of the road user benefits associated with given levels of expenditure.

The main significance of the definition of the road user charging system in section 1 of the Act is that it obliges the RFA to follow a sequential process wherein the funding level must be determined first, strictly in accordance with the definition for economic efficiency, without taking account of the actual availability of funding. This constitutes the "funding regulatory" function of the RFA. The RFA's "amount of funding" determinations under section 20(4)(a) constitute "approvals in principle".

The second step in the funding process is to determine the "manner" in which funding should be provided. Section 20(4)(b) of the Act regulates this part of the funding process and gives recognition to the fact that actually available funding may not be sufficient to achieve the economically efficient funding level. This could be because of initial inadequate levels of road user charges (since such charges may not be substantially increased in any one year and must, in addition, be kept reasonably stable in real terms over the longer term – see section 20(4)(b)(ii) of the Act). The level of funding which is decided as being practically achievable to be raised through road user charges in a given year becomes the target revenue level for setting the rates of road user charges for that year.

The final step in the funding process, regulated in terms of section 18 of the Act, is to set the rates of road user charges so that they fully recover the target revenue level (taking account of any bridging finance which may have been obtained by the RFA), are equitable in their impact on different categories of vehicle owners and send the right type of "pricing signals" to ensure efficient use of resources such as fuels, motor vehicles, etc.

The unique feature of the Namibian road user charging system is that the rates road user charges must eventually be set at the rates which will provide the economically efficient funding level. This differs from the approach in other countries, e.g. New Zealand, where the rates of road user charges, such as fuel levies, are first set at levels which are regarded as "acceptable" before the road expenditure programme is finalised. The latter system implies that expenditure is dictated by general perceptions of the acceptability of the levels of road user charges vis-à-vis the road service level provided. The funding process therefore follows the reverse sequence to that in Namibia and the function of the roads agency is therefore to prioritise funding allocations in a way which maximises road user benefits with the available funding. (It may be argued that there is no basic difference between the approach in Namibia and that in New Zealand other than that the funding process in the one relies on perceptions and in the other on statutorily enforced technical calculations.)

Some of the implications of the road user charging policies implemented by the RFA Act are:

- a practical definition of "economically efficient" in relation to the road sector is necessary;
- the "economically efficient" or "optimum" average, longer term, real stable funding level must be determined – implying the need for a longer term roads master plan - in order to determine reasonably stable rates of road user charges;
- all expenditure associated with the economically efficient funding level must be recovered from road users via equitable road user charges;
- the funding process must be carefully prescribed to ensure the sequential nature of decision-making;
- the management of the road user charging system must be placed under the control of a "professional" and independent Board of Directors rather than a "representative" board; and
- the RFA must have "autonomy" to determine road funding and set road user charges.

The RFA apparently has a great deal of autonomy but its decisions are in reality strictly dictated by the principles enshrined in the RFA Act. It is therefore a case of the supremacy of the Act. To ensure that the RFA, on the one hand, complies with the Act, and, on the other hand is protected against outside interference, its decisions about road funding may be challenged (but, on the other hand, confirmed) via a disputes procedure which must be entrusted to an independent panel of experts.

Some of the other features of the RFA Act are that:

- road user charges revenues must be deposited in the Road Fund to reassure road users that such revenues are not diverted elsewhere;
- the expenditures for which the Road Fund may be used are prescribed in the RFA Act[4] and comprise:

[4] In section 17(1) of the Act.

- the management of the proclaimed national road network separate from roads in local authority areas (however, major urban arterial roads carrying a large proportion of out of town traffic qualify for funding from the Road Fund);

- roads-related functions such as traffic law enforcement, operation of traffic information systems, etc. These must also be funded in accordance with economic efficiency principles, i.e. it should be possible to prove that the value of the benefits to road users exceed their funding contribution;

- the traffic-related urban road maintenance in recognition of the fact that such maintenance was previously supported from the side of Government and that much of the revenue via the road user charging system is generated on urban roads. This funding is therefore really justified in terms of "equity" considerations;[5]

- funding is only provided to "approved authorities" that have been found eligible by the RFA to receive funding from the Road Fund; and

- the RFA's budget is called a "business plan", is adopted every year, covers a five year period of which only the first year constitutes expenditure approval and is presented in the form of a balanced revenue and expenditure budget. Revenues may be supplemented by loans which have to be repaid later out of road user charges.

The new policies in the road sector cater for so-called "social roads" i.e. roads necessary to ensure accessibility in areas where traffic volumes are too low to justify funding in terms of the economic efficiency principle. Responsibilities for such roads mostly fall outside the ambit of the RFA Act. The Roads Authority Act requires the Authority to construct such roads with funds provided by the Minister responsible for transport but they are subsequently maintained in accordance with minimum standards prescribed by the said Minister with funds provided from the Road Fund. The effect of the above is that the proclaimed national road network managed by the Roads Authority comprises both "economically efficient" roads funded from the Road Fund and "social" roads funded from other sources, mainly Parliamentary appropriations.

2.3. Some of the major constraints and issues which have arisen

This Report is not required to address the basic policies underlying the RFA Act, only the strengths and weaknesses of the Act in ensuring implementation of the basic policies. However, in addressing the issues practical considerations play a role and have to be taken into account and dealt with within the provision of the legislation.

The main challenges which have confronted or are confronting the RFA in implementing the basic policies and in achieving its mandate of ensuring an economically efficient road sector are:

- the quantification of the real, long term, stable and "economically efficient" level of funding to be raised through road user charges;

[5] This is not specifically stated in the Act.

- the establishment of a generally acceptable, practicable definitions of "economically efficient" which can be applied to the different expenditures sanctioned in terms of the Act and which together define the level of funding to be raised; and

- the implementation of equitable road user charges which are sufficient to raise the required revenue.

Until recently the RFA operated on the premise (however, with strong supporting evidence) that the total revenue being raised through the existing rates of road user charges was far below what it should be. The RFA therefore attempted to increase the rates of road user charges as quickly as possible, albeit in accordance with the stability requirements of the Act, while awaiting confirmation concerning the required long-term expenditure level.

The RFA's most serious problem has been opposition to proposed increases in the rates of fuel levies from the Ministry of Mines and Energy.[6] Part of this opposition may stem from apparently conflicting provisions regarding the powers with regard to the imposition of fuel levies in the Petroleum Products and Energy Act and the RFA Act - an issue addressed in this Report. Opposition to increases in road user charges can be expected to spread wider as fuel levies are further increased in future.

The real issue is therefore not about control over the selling price of fuel but whether road funding should continue to be regulated in accordance with strict principles of economic efficiency and whether road users should be required to fully pay the costs of road provision.

From a more practical perspective, the RFA, in cooperation with the RA, has accepted a first draft of a Medium to Long Term Roads Master Plan (MLTRMP) which provides a reasonably convincing starting point for defining the long term funding requirements. The RFA is therefore now able to make some predictions as to the future rates of road user charges necessary to ensure an economically efficient road sector. These are well in excess of present road user charges rates and suggest that the opposition to increases in fuel levies (responsible for the major part of revenue) will remain controversial and even that opposition will strengthen in future.

From a legal and policy perspective the options to address the above issue would appear to be:

- A critical review of the RFA's definition of "economically efficient". Since the principal legislation does not define the concept some pragmatism would seem to be possible.

- A critical review of the technical formula used to calculate road funding, specifically with regard to those empirical input and cost assumptions to which road users can

[6] In this regard the Client, in its Guidance Document to the Consultants stated: "the RFA considered it prudent, in view of preliminary indications of the overall level of funding from the road user charging system being inadequate to meet the objects of the RFA Act, to introduce moderate increases in the level of road user charges on fuel, so as to minimize the risk of steep future increases in such charges. However, in view of the resistance of the Ministry of Mines and Energy against such increases, based on its interpretation of the PPE Act versus the RFA Act, and the lack of conclusive proof regarding the need for such increases, the RFA has so far refrained from taking the matter further. A definite potential for conflict would, however, arise as soon as the RFA comes into possession of such proof and needs to act on it in terms of the RFA Act.

relate (e.g. vehicle operating costs). If these are accepted by road users they are more likely to support increases in road user charges.

- Greater exploitation of the consultation provisions of the Act to secure wider understanding and support for the road user charging system.

- Improved reporting with regard to funding and road user charges, particularly so that performance in relation to the objectives and of the road user charging system is exposed.

2.4. Concluding comments

The Namibian Road Sector Reform is ambitious and in the final analysis intended to benefit not only the national economy, through the increased efficiencies it envisages introducing in the road sector, but also individual road users.

Ultimately the Road Sector Reform can only survive in its present form if it is generally accepted and this will depend on, on the one hand, proper use of the transparency provisions provided for in the Act, and, on the other hand, a pragmatic approach to the definition, and implementation, of the concept "economic efficiency". It will be particularly important that the technical calculations to determine so-called "optimum" funding levels can survive critical scrutiny and that the estimates which must of necessity be made with regard to project costs, future traffic volumes, etc. - which experience with transport projects worldwide has shown are often far too optimistic – are realistic and honest.[7] Finally, allocated funding must be effectively and efficiently used and seen to be so used.

3. CONFLICTS BETWEEN THE RFA ACT AND PPE AND RTT ACTS

3.1. Conflicts between the RFA Act and the PPE Act

3.1.1. Synopsis of Issue

The TOR for the Review of the Legislation provides a synopsis of the issue as follows:

"The RFA Act empowers the RFA to determine levies on petrol and diesel fuel, which according to the RFA Act are to be included in the gazetted price of these fuels. On the other hand, however, the PPE Act empowers the Minister of Mines and Energy to set the price of these fuels. This apparent conflict between the two Acts causes a lack of clearly demarcated powers and responsibilities, which could potentially seriously impact on the RFA's achievement of the objects of the RFA Act."

The TOR further require the Consultant to:

"*…. prepare an expert legal analysis of the aforementioned perceived conflict, and based on guidance and instructions from the RFA, the Consultant shall draft the required amendments to the RFA Act.*

[7] See reference no. 18 in Annexure B.

The Consultant shall further peruse the PPE Act to identify and record any other instances where a potential conflict between the RFA and PPE Acts could be perceived, and present these to the RFA for consideration."

3.1.2. Legal opinions by Adv Botha and Prof Erasmus regarding conflicts between the PPE Act and the RFA Act

Section 18 of the RFA Act provides as follows:

> *"18. (1) Subject to section 19, the Administration may from time to time after consultation with the Minister and such parties as the Minister may direct, by notice in the Gazette, and in accordance with such principles as may be prescribed, impose any one or more of the following road user charges for the achievement of the objects of this Act, namely:*
>
> *(d) subject to subsection (4)(f), a levy on every litre of petrol and every litre of diesel sold by any undertaking at any point in Namibia and which is to be included in any determination of the selling price of petrol or diesel, as the case may be, under any law relating to petroleum products.*
>
> *(4) A notice referred to in subsection (1) shall state –*
>
> *(a) the amount or rate of the road user charge imposed;*
>
> *(b) the times when and the manner in which the road user charge shall be paid;*
>
> *(c) the person who shall be liable for the payment of the road user charge;*
>
> *(d) the person who shall be responsible for the collection of the road user charge;*
>
> *(e) the penalty payable in the event of the late payment of the road user charge;*
>
> *(f) subject to subsection (5), the circumstances and the manner in which exemption from the payment of any road user charge imposed under subsection (1)(d) may be granted, or a refund of an amount paid in respect of such charge may be made in respect of fuel sold for purposes other than on-road use;".*

A comprehensive legal analysis by Adv Janette Botha on whether the Petroleum Products and Energy Act, 1990 (Act No.13 of 1990) (hereafter "PPE Act") and the RFA Act are in conflict, specifically whether the *'the Ministry of Mines and Energy is empowered in terms of any legislation to refuse to increase the petrol price as a result of the imposition of a fuel levy as a road user charge"*, is available. This opinion is reproduced as an annexure to this Report. It was carefully reviewed and we are of the view that the previous opinion should be referred to, and confirmed by, a Senior Council before the RFA takes any action based on its perceived

powers to implement fuel levies notwithstanding opposition from the Minister of Mines and Energy.

We note that the finding of the above legal opinion was as follows:

- *"The Petroleum Products and Energy Act, 1992 and the RFA Act do not contradict each other on the question of the determination of the fuel price; (The Petroleum Products and Energy Act, 1990, regulates a fuel tax, while the RFA Act regulates a road user charge. The method of a fuel levy is used only because the administration of the levy is relatively inexpensive);*

- *In terms of section 18(1)(d) of the RFA Act, it is mandatory for the Minister of Mines and Energy to include the fuel levy imposed in terms of that Act in the fuel price;*

- *The common law and the Constitution requires both parties to exercise their functions justly and reasonably in accordance with the principles set out in paragraph 5 of that opinion. The effect would be that the Minister of Mines and Energy can at the most indicate to the RFA (or the Minister of Finance as responsible Minister) that he/she is of the opinion that the Minister of Finance or the RFA did not exercise his/her/its functions correctly in terms of the provisions of the Constitution.*"

If the legal opinion were to be confirmed it would, on a strict interpretation, indicate that no amendments to the RFA Act are required.

The following legal opinion was received from Prof. G. Erasmus on the same issues dealt with in Adv. Botha's opinion:

"CONFLICTS BETWEEN THE RFA ACT AND PPE ACT

1 I have been asked to comment on the legal opinion earlier submitted and dealing with the apparent conflict between the RFA Act and the PPE Act; and more specifically the meaning and effect of section 18(1)(d) of the RFA Act. This provision reads:

> "***18.*** *(1) Subject to section 19, the Administration may from time to time after consultation with the Minister and such parties as the Minister may direct, by notice in the Gazette, and in accordance with such principles as may be prescribed, impose any one or more of the following road user charges for the achievement of the objects of this Act, namely:*
>
> *(d) subject to subsection (4)(f), a levy on every litre of petrol and every litre of diesel sold by any undertaking at any point in Namibia and which is to be included in any determination of the selling price of petrol or diesel, as the case may be, under any law relating to petroleum products.*"

2 The income for the RFA from levies on fuel is crucial for its functioning. However, the RFA does not itself have the power to ensure that such fuel levies will indeed be enacted, included in the selling price of fuel and collected. The power to determine the selling price of petrol and diesel belongs to the Minister of Mines and Energy, acting

under the Petroleum Products and Energy Act of 1990. There is nothing in this latter Act which compels that Minister to give effect to section 18(1)(d) of the RFA Act. The obligation to do so depends exclusively on the meaning of section 18(1)(d) of the RFA Act.

3 The earlier legal opinion concluded that the Petroleum Products and Energy Act and the RFA Act do not "contradict each other on the question of the determination of the fuel price." This opinion holds that "it is mandatory for the Minister of Mines and Energy to include the fuel levy imposed in terms of that Act in the fuel price." For the purposes of this conclusion the opinion relies on the mandatory effect of the words "which is to be included in any determination of the selling price of petrol or diesel, as the case may be, under any relating to petroleum products." The opinion states that in terms of the "plain language" style of drafting legislation that the words "which is to be included" have to be read and interpreted as if it has the same meaning as the word "shall" traditionally used to indicate obligations in legislation.

4 The difficulty with this particular argument is that the RFA Act is not consistently drafted in the plain language style. As a matter of fact, the impression that the Act creates is very much one of being drafted in the traditional style. It uses the terms "may" and "shall" throughout the body of this Act. One may even conclude that by deliberately using a different formulation here, the Legislature had a different effect in mind. If this is correct then there must be some degree of uncertainty as to whether the picture is indeed as crystal clear as the opinion may suggest. There seems to be sufficient uncertainty to warrant further investigation of this matter.

5 Another reason for reaching this conclusion is the fact that section 18(1)(d) is also rather vague and lacks sufficient detail as to exactly when and how the levy decided by the RFA will be included and collected through the legislative and executive actions of the Minister of Mines and Energy. Furthermore, if one considers the basic rule of statutory interpretation, i.e. that financially burdensome provisions are to be strictly applied, there should actually be exact provision in the Act for the way in which the Minister of Mines and Energy is to give effect to a fuel levy and as to when exactly this should be done.

6 The procedure under section 19 of the Petroleum Products and Energy Act for imposing a levy on any type of fuel is also not that simple. It requires the Minister of Mines and Energy to act, but with the concurrence of the Minister of Finance. The fuel price is a sensitive matter and can have direct implications for the government's monetary and fiscal policies and can impact quite directly on inflation. From this point of view it makes sense to be careful and not to take decisions on increases and fuel prices lightly. It is also a matter where the left hand of government must know what the right hand is doing and a holistic approach is required. The Minister of Mines and Energy has to take several factors into account when determining the fuel price.

7 The Minister of Finance apparently plays a central role in the whole process. He/she has to be **consulted** by the Administration first and then (when the same matter goes to Mines and Energy) has to **concur** before a levy on fuel is imposed. Such different powers for the same Minister regarding the same issue (a levy by the Administration) add to the lack of clarity regarding the intention of the Legislature.

8 In the light of these considerations it seems prudent to obtain more clarity with respect to this particular question and, if required, to spell out the procedures and obligations for actually imposing, collecting and making available to the RFA, all the levies on fuel that the Administration decides to impose. The present legislation is not sufficiently clear and certain on this point. The consequences of the uncertainty are such to justify further study and investigation.

9 It has been indicated to me that, because of policy considerations, the likelihood of litigation by the RFA against the Minister of Mines and Energy is unlikely. (There seems to be an assumption that the Administration can enforce its decisions on fuel levies through judicial means.) But the capacity of public authorities to litigate against each other is a somewhat complicated legal matter. Courts of law have often ruled that the state cannot sue itself. (See Baxter *Administrative Law* at 649.) There are, however, many examples where the courts have also found that sufficient distance in identity and separate status can indeed exist in government structures and allow organs of state to litigate against each other. (In *Government of the Republic of South Africa v Government of KwaZulu* 1983 (1) SA 164 (A)) the Appellate Division of the South African Supreme Court that it was "a general principle of our law that one organ of the State cannot sue another organ of the State" but that in this instance there was "sufficient separation in identity" between the KwaZulu and South African governments for the former to seek judicial redress against the latter in the circumstances of that dispute. That brought Baxter to conclude as follows:

> *Whether they possess some or all of the capacity of private corporate personae is a matter of statutory interpretation; the answer will vary from public authority to public authority and from statutory power to statutory power. Whether one of these capacities is the* capacity to sue *will depend upon the constitutive statute concerned. Even if such capacity does exist, whether it implies the power to sue another public authority, will depend upon a construction of the statute in the light of the particular circumstances.*

Baxter's summary of the law could mean that the RFA may not have the required legal capacity to sue the Minister of Mines and Energy. Further study of the RFA Act and other relevant legislation will also be required in order to determine the intention of the Legislature on this particular point."

The two conflicting legal opinions indicate that there may be some doubt about the power of the RFA to unilaterally impose fuel levies which the Minister of Mines and Energy will then be obliged to include in the selling price of petrol and diesel fuel.

We further note that a possible problem may arise in regard to the fact that the Minister of Mines and Energy may impose a maximum and a minimum price for fuel, or both a maximum and a minimum price. If that Minister acts in terms of those powers, the result may be that a "maximum price" is in fact not "final" a maximum price (until such time as it in fact includes the road user fuel levy) and that there may be therefore be confusion with regard to the "maximum price" in terms of the PPE Act. The RFA Act should therefore also clearly indicate how this situation should be dealt with.

We have also noted that the selling price of diesel fuel has been deregulated and that the selling price of petrol may in future also be deregulated. The provisions of the RFA Act

dealing with the imposition and collection of fuel levies should therefore also be reviewed to ensure that the RFA is at all times able to impose and collect fuel levies in accordance with the principles of the RFA Act.

Although the original terms of reference for this assignment did not require us to advise the RFA in regard to the strategies it should follow in order to resolve issues other than through the provisions of the Act, we have nevertheless regarded it as worthwhile to offer to review the policy and strategy implications related to the fuel levies in some depth and the Client has indicated acceptance of this offer.[8]

3.1.3. Other instances of potential conflict between the RFA and PPE Acts

The PPE Act was reviewed and no further instances of conflict were identified.

3.1.4. Policy aspects affecting the setting of the fuel levy and why it is important for the RFA to be able to set the fuel levy[9]

Government has accepted a definite policy with regard to the funding arrangements for the road sector in Namibia. The RFA has been created as a creature of statute as part of this policy and with a definite mandate and powers to implement Government's policy.

The RFA Act, in section 1(1), defines the road user charging system as a system "providing for *independent* regulation of road funding in accordance with *economic efficiency criteria* and *full cost recovery from road users* comprising, in *sequential order*, the following: (i) the determination of the amount of funding for road projects and programmes, (ii) the determination of the manner in which such amount of funding shall be allocated, and (iii) the determination, and the imposition, of the types and rates of road user charges." The Act empowers the RFA to make the determinations under (i), (ii) and (iii) above.

Because of the acceptance of the principle of full cost recovery, the revenue from road user charges must equal expenditure (see also section 18(3)(a) of the Act in this regard). This implies that any adjustment in the rates of any one of the road user charging instruments, when the set of road user charging instruments have been set to fully recover, in an equitable way, the full proposed funding programme must inevitably lead to one or more of the following consequences:

(a) A compensating adjustment in the rates of the other charging instruments;

(b) recourse to loan funding in the short term to supply the funding lost via the (downward) adjustment of a specific road user charge;

(c) a downward adjustment of the total funding programme.

Assuming that the road charging instruments under discussion are the levies on petrol and diesel, option (a) above is not a viable option, except possibly for minor funding adjustments,

[8] See the Client's Guidance Document.

[9] Hereunder existing policies by Government, policy documents, policy by client, etc must be indicated – also if applicable lack of policy and proposals should be made. Where there are policy documents reference should be made to them.

since revenue from fuel levies comprises by far the major share of the RFA's revenue.[10] Relatively large adjustments would have to be made to the rates of other road user charging instruments such as vehicle licence fees and the proposed mass-distance charges to compensate for even a relatively minor adjustment in the fuel levies. This also has implications for equity (section 18(3)(b) of the Act). Option (b) merely delays cost recovery to a later date and, taking into account that the RFA has already taken up loans to provide funding for serious road maintenance backlogs, is also not a viable option. Option (c) would imply that projects or programmes, which have been subjected to evaluation and found economically viable, must be postponed, and, if the fuel levies are not subsequently adjusted, eventually withdrawn through the appropriate procedures with consequent negative implications for the "economic efficiency" of the road sector.

Therefore, any failure to implement a proposed fuel levy increase (and this is interpreted as being other than a temporary postponement in implementing an increase) will essentially have the effect that the road sector must function less efficiently than it should. This would be in conflict with Government's declared policy.

Put differently, if the road funding programme were to be based on an initial decision about the acceptability of the rates of road user charges, it would be tantamount to "external" regulation of road funding - the basic function of the Road Fund Administration. It should be noted, however, that objections to road user charges would be valid if the RFA's funding determinations, funding programme and proposed road user charges have not been correctly calculated or if funding will not be efficiently utilised. Should that be the case, any objection to a proposed road user charge would be valid.

Therefore, the RFA must continue to be able to set the rates of road user charges, including those of road user fuel levies included in the pump price of petrol and diesel fuel. In this regard the following should be noted:

(i) the rates of road user charges are set after consultation with the Minister of Finance and such parties as the Minister may direct (section 18(1) of the Act);

(ii) concerns about the rates of road user charges, since they affect funding levels, should be dealt with or substantiated by reviewing the RFA's proposed funding programme as contained in its business plan (which also contains details of its proposed road user charges); and

(iii) it is possible to subject the content (i.e. the projects and programmes included therein) of a proposed road funding programme to review by an independent panel of experts (section 20(7) of the Act.

In view of the controversies surrounding the setting of fuel levies it is recommended that, should there be continued opposition to the RFA's proposals regarding fuel levies from the Ministry of Mines and Energy, an appropriate submission be made to Cabinet. This submission should:

[10] Following Africon's report on road user charges (April 2004) as Part B of the RUCS Review it has emerged that fuel levies are particularly efficient from a VAT point of view (even although the current arrangements with regard to VAT on road user fuel levies and the road user charging system are undoubtedly suspect). Therefore fuel levies will remain an important component of the RFA's revenue generation capabilities.

(a) set out the basic road user charging system policies and explain why any objection to proposed rates of road user charges should in reality be seen as an objection to the proposed road funding programme; and

(b) point out that such objections should therefore be addressed by the appropriate mechanisms provided in the legislation for reviewing the funding programme itself, i.e. the consultation and dispute adjudication procedures.

Since Namibia opted for a statutorily entrenched road user charging system, there is no other option. This system cannot function properly if the decisions of the RFA are attacked or resisted on grounds other than the rules of the game as set out in the legislation.

A very important element of any approach to Cabinet, if the proposal to do so is accepted,[11] is that the RFA must be in a position to adequately substantiate and quantitatively define its funding requirements by way of detailed analyses of different road projects and programmes to be funded. In addition, the RFA should also be able to indicate in quantitative terms what the effects of a failure to optimally fund roads will be on the economy as a whole and for individual road users (different categories of vehicle owners). The RFA should be prepared to also indicate strategies to phase in the required rates of road user charges and its funding strategies which take into account loan funding. These are all matters which should be supported by the RA's Medium to Long Term Roads Master Plan (MLTRMP) and the RFA's other funding obligations. It would be necessary to provide assurance that the recommended funding requirements reflect effective and efficient use of funds.

Finally it should be noted that Part B of the RUCS Review, namely the MIEERS Project, should provide quantitative and qualitative substantiation of the importance of the need to optimally fund the national road network, especially the economic implications for the national cost of road transport if road-funding programmes are delayed or not implemented at all.

3.1.5. Conclusions and recommendations

In view of the above, it can be concluded that -

(a) There is no absolute certainty that the PPE Act and the RFA Act do not conflict with each other and the RFA should obtain a further Senior Council opinion about this matter if it wishes to proceed with a "legal" approach;

(b) the provisions of section 18 of the RFA Act should be amended so that:

[11] The RFA stated its point of view, in the Guidance Document, as follows: "The RFA's viewpoint is that the basic policy as entrenched in the RFA Act, namely that the RFA should secure and allocate sufficient funds with a view to achieve a safe and efficient road sector, is beyond question; therefore, the RFA must raise the required amount of road user charges in total. However, if for some reason(s), irrespective of whether such reason(s) are eventually supported by the MIEERS Study or not, road user charge fuel levies should be treated with special precaution and subject to considerations different from other road user charges, this would be an issue to be resolved at Government policy level. The consequence to such policy decisions could then be that the RFA would have to raise the required balance of road user charges, which would other than for such 'special considerations' have been raised through fuel levies, by means of increased licence fees and/or mass-distance charges."

(i) the procedures to be followed in imposing fuel levies, including the time within which a road user fuel levy should be implemented (including implementation by way of adjustment the fuel price by the Minister of Mines and Energy), are spelt out;

(ii) the procedures to be followed if the selling price of petrol and diesel fuel are deregulated are also catered for; and

(c) in view of the possible political ramifications, it is not a feasible solution for the RFA, in the event that the Minister of Mines and Energy does not agree with the RFA's interpretation of its powers, or the amendments to the Act as proposed above, to resort to legal means against the Minister of Mines and Energy to force him or her to include the fuel levy at a rate as required by the RFA in the fuel price.

We wish to conclude by noting that the RFA's performance statement in terms of section 22 of the RFA Act (see discussion later in this Report) provides a particularly important instrument to not only facilitate consultation with interested parties (see especially the particulars to be provided by the RFA in terms of paragraph (a)(i)) and (ii) of section 22(1)) but also to obtain a form of prior "approval" for the longer term funding and user charging strategies of the RFA. The Ministry of Mines and Energy should be prominent in consultations affecting the finalisation of the performance statement. In this regard, therefore, the particulars required to be included in a performance statement should be reviewed. We believe that if these consultation opportunities are properly exploited they offer a way to: (a) identify opposition to increased rates of road user charges at an early stage, and (b) address any issues raised in connection with such proposed increases in terms of the basic policies of the road user charging system.[12]

If the Client agrees we propose that Cabinet be approached only after consultations in terms of the performance statement have identified problems.

We further draw the RFA's attention to a letter from the RFA to the MME dated 12 November 2001 in which it was proposed that a consultation mechanism be implemented.[13] We suggest that the RFA again give consideration to such a consultation procedure.

At the Cape Town Working Meeting held from 6 to 8 May 2004 the Consultants were asked to review the present text of the Act and to indicate whether it contains sufficient provisions to enable the RFA to administer and collect any road user charge. "Sufficient provisions" would also mean that the RFA would be able to implement the necessary systems. This is discussed in paragraph 3.2.1 ("Vehicle registration and licensing fees").

[12] We note that the Client recognised the possibility that the basic policy of the road user charging system could come under review. We quote from the Guidance Document: "Of course, the outcome of such a policy submission to Cabinet could, independently from the intentions of the submission as such, be that the Government revises its policy of recovering the full economically justifiable cost of the road network from road users. In this case, a large-scale review of the road user charging system would then be indicated, which would go beyond the scope of the current review."

[13] Paragraph 5 of the letter stated: "The Road Fund Administration envisages the establishment of a consultation mechanism, involving your Ministry, road user groups, the Roads Authority and the Road Fund Administration in order to obtain broad understanding of the issues involved and then also the support of interested parties for future road user charges, such as the levy on fuel."

It is recommended that -

(a) the RFA accept that the solution to the conflict discussed herein does not lie in a process of legal confrontation, but that the legal interpretation already obtained be confirmed or otherwise as a matter of principle;

(b) in the event that the Minister of Mines and Energy does not accept that the RFA should have the power to set the fuel levies or the policy providing for the RFA's autonomous power in this regard, an appropriate Cabinet Memorandum should be prepared by the RFA and submitted to Cabinet *via* the Minister of Finance to explain the RFA's position on the basis of the principles of the road user charging system as concretised in the RFA Act. In preparing such a submission the RFA should have available adequate and convincing motivation regarding the funding requirements and the road user charges it regards as necessary to comply with the provisions of the Act and also the economic implications if there should be a failure to implement the proposed funding strategies due to any delays in implementing suitable road user charges;

(c) the RFA should reconfirm its intention to consult with the Ministry of Mines and Energy before imposing any fuel levy forming part of the proposed road user charges to be included in a business plan (and to consider whether it is necessary or desirable to include appropriate amendments to the RFA Act to ensure that such consultations are statutorily prescribed); and

(d) the RFA should indicate which of the amendments proposed to the Act above it wishes to be drafted.

3.2. Conflicts between RFA Act and RTT Act

3.2.1. Vehicle registration and licensing fees

3.2.1.1 The issue

Whilst the object of the RFA Act is to promote the achievement of an economically efficient road sector, the object of the RTT Act is the quality regulation of road traffic. Both the RFA Act and the RTT Act contain powers for the levying of vehicle registration and licence fees. Because this problem concerning duplication was known in the early stages, this situation did not give rise to the double levying of those fees. Only the RFA currently sets the rates of and receives the revenue from vehicle registration and licence fees so that they are for all practical purposes being dealt with as a road user charge from the point of view of the RFA.

However, there is good reason why vehicle registration and licence fees should be dealt with from the perspective of each of the above-mentioned Acts and that the issue should now be properly addressed.

Issues that must receive attention are the following:

(a) Whether the two Acts are in conflict.

(b) What are the basic policy considerations from the point of view of:

(i) the RFA;

(ii) the Minister responsible for transport?

(c) What are the practical considerations to be taken into account with regard to the determination, collection and administration of vehicle registration and licence fees?

(d) What arrangements should be implemented?

(e) What amendments to the legislation (RFA Act and RTT Act), if any, are required?

3.2.1.2 Discussion

The Minister responsible for transport is responsible for the quality regulation of road traffic and transport.

The basis of the quality regulatory system is the vehicle registration and licensing system. Section 20 of the RTT Act requires that the system for registration and licensing of motor vehicles shall be as prescribed by the Minister. "Prescribe" here means "prescribe by regulation". RTT Regulations are promulgated in terms of section 91 of the RTT Act. Even although the levels of licence fees are currently determined by a Government notice in terms of subsections 18(1) and (4) of the RFA Act, the system and exemptions are prescribed in the RTT Regulations.

For purposes of road quality regulation the process of vehicle registration and licensing could be assumed to serve the following purposes (the RTT Act does not provide specific guidance in this regard):

(a) To ensure that details of all vehicles using public roads are placed on record for quality regulation purposes (registration);

(b) authorising the use of the vehicle on public roads (licensing) – see section 20(2) of the RTT Act which states that *"no person shall operate on a public road any motor vehicle which is not registered and licensed …*"; and

(c) imposing a tax (revenue), levying a user charge (registration/administrative costs).

The licensing system has evolved from a wheel tax in the early 1900's, to the hybrid system that it is today. However, the policy underlying the granting of exemptions leans more towards the principles of tax on property rather than being based on whether the vehicle is used on the road. The latter policy (or lack thereof[14]), was mainly based on the fact that licence fee evasion is almost impossible to detect if exemptions are based on whether the vehicle is used on a public road or not. If the road user charging policy is implemented in a manner that is theoretically pure, the fact that licence fees are calculated on the basis of tare is

[14] Section 91(2)(xxvi) of the RTT Act provides for the prescribing of fees for any application, licence, certificate, etc. under the Act, but there is no reference in the Act to principles of cost recovery or compensation except possibly in section 111(3) of that Act dealing with the power of the Minister to enter into agreements for the performance of functions.

also unacceptable. A change in policy with regard to this calculation will necessitate a change of the NATIS with concomitant difficulties[15].

Section 18(1)(c) of the RFA Act refers to a charge for road use namely: *"registration and annual licence fees in respect of motor vehicles registered in Namibia"*. In terms of the principles of the road user charging system a road user charge is imposed in accordance with cost recovery, equity, efficiency and non-discrimination objectives in mind (see subsection 18(3)(a) to (d) of the RFA Act). From this perspective the RFA would not necessarily need to distinguish between "registration" and "licensing". Registration and annual licence fees are therefore a single road user charge which is paid once a year. It constitutes a so-called "fixed" type cost charge in comparison to "variable" or "consumption" type charges which are paid on a per kilometre basis. During a Working Meeting held in Cape Town during 6 to 8 May 2004 the RFA, however, indicated that it would not require a separate "registration" fee to cover the costs of placing a vehicle's details on a register and that it would work such costs into the fixed annual fee.

The view of the RFA is that it is entitled to:[16]

(a) establish an own vehicle register as an administrative tool for the purpose of collecting road user charges; and

(b) impose annual licence fees as a road user charge in accordance with criteria determined by the RFA, which may be different from the licence fee criteria used by the Minister in terms of the RTT Act. Especially in view of the latter possibility, and in view of the known problem that the NaTIS vehicle categories are not well suited for the purpose of determining licence fees such as to be an equitable road user charge, it is reasonable to conclude that the RFA should be empowered to maintain an own vehicle register other than any vehicle register that is kept in terms of the RTT Act. (However, this would only be necessary if the two registers are based on different vehicle classification systems – something which should preferably be avoided.)

The RFA is therefore of the view that factually it is merely an administrative arrangement that it currently, but not necessarily in future -

(a) makes use of the vehicle register of NaTIS, including the vehicle categories defined in the NaTIS register, for the purpose of collecting licence fees as a road user charge; and

(b) determines the levels of registration and licensing fees, which are currently collected by NaTIS, in terms of the RFA Act, while the Minister for Transport refrains from determining such fees in terms of the RTT Act, and the RFA receives the full amount of such fees as a road user charge. The Minister for Transport lays no claim to any portion thereof with the understanding that the RFA will fund certain costs of NaTIS (as per the section 111 Agreement[17]).

[15] This statement may or may not be correct, depending on whether the NaTIS calculates the registration and licence fees or whether they are individually calculated by hand for different vehicle classes.
[16] See Guidance Document.
[17] The status of the so-called "section 111 Agreement" is uncertain. In any event, it would be contrary to the principles of the RFA Act if the RFA by way of agreement bound itself to provide a certain percentage of any costs where it is not in a position to "regulate" the total costs in accordance with the principles of the road user charging system.

From a legal point of view, the RFA therefore believes that no conflict exists between the RFA and RTT Acts with regard to registration and licence fees, except for the unfortunate circumstance that the terms "registration" and "licence" fees, as used in the RFA Act, have historically been associated by the public with fees imposed by the Minister for Transport in accordance with traffic and transport legislation, and not with road user charges in specific. It is not the point here to argue whether such fees implicitly have always been road user charges in any event, even though they were paid into the State Revenue Fund, but rather that the use of the terminology could become confusing to the public under the new dispensation where both the RFA and the Minister for Transport can impose such fees.

During the Working Meeting held in Cape Town on 6 to 8 May 2004 the following further points emerged from the discussions:

(a) the NaTIS system, which was originally donated to Namibia by South Africa, is currently being upgraded by South Africa. The "upgradings" will not necessarily be donated to Namibia and may also not be suitable for Namibia or affordable;

(b) the RFA stated that it should have adequate powers in its own legislation to implement its own "vehicle registration and licensing system",[18] separate from the powers of the Minister responsible for transport in terms of the RTT Act, since it could not be assumed that the two parties would in future always have the same objectives[19];

(c) in so far as the *status quo* continues, i.e. that the licence fees are levied under the RFA Act whilst the licensing system is administered under the RTT Act, it is suggested that authorisation be included in the RFA Act that sanctions this situation. (This does not mean that the validity of the present system is questioned.);

(d) there should be adequate provision for exemptions. This means that the current exemption provisions in respect of fuel levies should be broadened to cover all types of road user charges;

(e) the name to be given to the fixed vehicle "registration and annual licensing fee" in terms of the RFA Act should be reconsidered to ensure an own name for the road user charge imposed by the RFA so as to avoid any confusion in any other legislation that refers to a fee by that name; [20]

[18] The current powers of the RFA to implement the necessary administrative system for the management of a road user charge and for the collection of the charge is to be found in the provisions of section 18(4) of the Act and the powers of the Finance Minister to make regulations with regard to "the collection of road user charges", the manner in which the Administration may perform any function in terms of this Act; and the general provision that authorises regulations on "any other matter which the Minister considers necessary to give effect to the objects of this Act" (see paragraphs (c), (d) and (g) of section 28. It is however, suggested that the power to implement such an administrative system should be stated in stronger terms and that that power should preferably be inserted in section 18 itself.

[19] Similarly, it should have the necessary powers to implement the systems required in connection with the administration and collection of road user charges levied in respect of mass-distance charges, entry fees and fuel levies (see paragraphs (a), (b) and (d) of section 18(1), respectively.

[20] If a licensing system is established under the RFA Act in future, it may occur that even the interpretation of the references to motor vehicles registered in Namibia that appears in paragraphs (a), (b) and (c) of section 18(1) can lead to confusion. Will it refer to vehicles registered under the RFA Act or under the RTTA Act?

(f) it would be preferable if the vehicle classifications system of the RFA and the Minister were compatible and that, if fees are going to be levied under both Acts in future, those fees are collected at the same time to avoid charging road users twice for a similar fee. The legislation should therefore also make it possible for the two parties to work together but details can be dealt with *via* regulations, only the basic powers to be ensconced in the principal legislation; and

(g) it would be necessary to discuss the practical details of the two systems with the Ministry of Works, Transport and Communication with a view to deciding how the different Acts should be amended to ensure that the interests of both parties as well as road users are best served.

3.2.1.3 Conclusions

There is no conflict between the two Acts. Both the RFA and the Minister can impose a vehicle registration and annual licensing fees under their respective legislation. However, the fee/charge imposed by the Minister and the RFA should not have the same name.

The assumed basic policy considerations of the Minister, from the point of view road traffic quality regulation, and the RFA, in terms of the provisions of the RFA Act, have been mentioned above. However, the Minister should confirm the policies and objectives attributed to him. There are various aspects of the road traffic quality regulatory system which should be clarified, particularly with regard to the policy for determining the rates of fees payable in terms of the RTT Act and how they should be disposed of in a way to finance (i.e. the element of user charging should be introduced) functions performed in terms of the Act.[21]

The RFA's policies with regard to road user charges have also been mentioned above.

As far as the practical arrangements to impose, collect and administer vehicle registration and licensing fees under the RTT Act and the RFA Act are concerned, a number of issues will need to be addressed: These are, *inter alia*:

(a) which registers should be kept by the different parties and should they be kept separately;

(b) what vehicle classification systems will be used by the different parties;

(c) selection of a name for the "fixed" annual road user charge on vehicles registered in Namibia under the RFA Act, distinct from that of the fee under the RTT Act.[22] One could also provide that the charge should be leviable as charge that aims to recover fixed costs;

(d) the arrangements for imposing the fees and road user charges (regulations and Notices in terms of the *Gazette*);

[21] See Reference no. 8 in the annexures.

[22] It needs to be mentioned that the RTT Act does not provide in so many words for the account into which fees levied under that Act should be deposited. However, since the Act is administered by the Minister responsible for transport it must be assumed that such fee income is deposited in the State Revenue Fund.

(e) a better arrangement, if the RA continues to collect the relevant fees and road user charges, between the Minister and the RFA regarding the disposal of fees and road user charges revenues so that the funding responsibility of each party for the NaTIS function is clarified[23];

(f) the documentation required for each of the road user charge and the fee; and

(g) whether the system of MDCs (especially if they are initially to be levied as a fixed annual fee) could be operated as part of the registration and licence fee.

It is noted that the "entry fee" in respect of motor vehicles not registered in Namibia under section 18(1)(b) of the RFA Act is in fact nothing but the temporary equivalent for foreign registered vehicles of the fixed annual road user charges under section 18(1)(c) of the Act and that these two charges should be combined under one paragraph.

This Report cannot make final proposals with regard to the amendments to be made to the RFA Act and RTT Act, other than what has been proposed above, before further discussions between the RFA and the Ministry of Works, Transport and Communication have taken place and various policy and technical issues about the NaTIS have been resolved.

3.2.1.4 Recommendations

It is recommended that:

(a) appropriate draft amendments to the RFA Act be prepared which provide legal clarity about the RFA's power to implement its own register with regard to vehicles and to impose vehicle registration and licensing fees separate to those imposed in terms of the RTT Act and that for this purpose a suitable different name for the "road user charge in respect of vehicles registered in Namibia and foreign registered vehicles temporarily entering Namibia" under the RFA Act be selected;

(b) the RFA initiate discussions with the Ministry of Works, Transport and Communication with a view to reaching agreement about:

  (i) the adoption of a common vehicle classification system to be used for both the road traffic quality regulation system and the road user charging system;

  (ii) the simultaneous collection of both the "fixed annual road user charge" in terms of the RFA Act and the vehicle registration and licensing fees in terms of the RTT Act;

  (iii) whether the RA, as agent of both the Minister and the RFA, could collect both the relevant road user charge and registration and licence fee and be compensated by both parties;

[23] The Consultants are concerned about the present arrangements whereby fee revenues are paid over to the Road Fund since these confuse the policy issues and also the account-keeping with regard to costs of collection and net revenues from specific road user charges.

(iv) the way in which the funding of the NaTIS function should be dealt with by the parties;

(v) amendments to the RTT Act, if any, to ensure that the above options are legally authorised, both parties being in agreement; and

(vi) other matters of common interest, namely the exemptions under the RTT Act from paying registration and licensing fees, particularly those with regard to government vehicles; and

(c) the current draft section 111 Agreement [24] be finalised in accordance with the agreements reached above.

3.2.2. Fines for the overloading of vehicles

3.2.2.1 The issue

Both the RTT Act and the RFA Act determine the account that overload fines should be paid into. The purpose herein is to:

(a) analyse the perceived conflict, having regard to the RFA's view as set out below;

(b) present a legal opinion, which might either confirm or disprove the RFA's view in whole or in part or expand thereon, as appropriate;

(c) express a motivated opinion on the basis of policy and principles, whether the RFA should receive overloading fines directly, or possibly through apportionment by the Minister responsible for transport in terms of the RTT Act.

3.2.2.2 The RFA's View[25]

An apparent conflict exists in that all fines, including those for overloading should, according to section 109(1) of the RTT Act, be paid into the State Revenue Fund, whereas section 16(1)(i) of the RFA Act states:

> *"16. (1) There is hereby established a fund to be known as the Road Fund into which shall be paid –"*
>
> *"(i) any fines imposed in respect of any contravention of, or failure to comply with, any provision in a law relating to the overloading of vehicles…".*

It has been contended that overloading fines specifically should be paid into the Road Fund. The latter contention is based on the provisions of section 16(1)(i) of the RFA Act. The RFA, however, believes this to be an empowering rather than a prescriptive provision; in other words it is not a requirement that all such fines should indeed be paid into the Road Fund. In support of this interpretation, compare the aforementioned wording of item (i) to the wording

[24] Refer to paragraph 8.2 of this Report for further discussion of the functions performed by the RA for the Minister responsible for transport.
[25] Guidance document, provided by the RFA.

of item (f), which reads:

> *"(f) any donation or grant made in respect of any project or programme".*

The latter clearly cannot mean that the Government and donors are obliged to pay all donations and grants made towards road projects and programmes into the Road Fund, as a decision whether to pay such donations or grants into the Road Fund or directly to a service supplier is indisputably the privilege of the Government or donor concerned. Therefore, the wording of these two items does not allow the conclusion that either should be seen as conveying an all-encompassing mandatory requirement.

Should the RFA receive overloading fines, it could also be argued that the Road Fund should take on an increased responsibility for the funding of road traffic safety. (If the funds were received by the Minister and apportioned to the RFA, the extent of the aforementioned argument could then possibly be limited to the amount of funds apportioned by the Minister.)

3.2.2.3 Legal opinion: The conflict between the RTTA/RFA Act on overload fines

The legal position with regard to overload fines relates to paragraph (ii) of the instruction from the RFA. The legal position dictates the depth of discussion of policy considerations such as required in terms of paragraph (i) of the instructions.

The following opinion was submitted by Adv. J. Botha:

A discrepancy exists between section 16(1)(i) of the Road Fund Administration Act, 1999, (Act No.18 of 1999) (the RFA Act) and section 109(1) of the Road Traffic and Transport Act, 1999(Act 22 of 1999) (the RTT Act) regarding into which account fine money collected should be paid. Section 109(1) of RTT Act states that "all fines imposed or moneys estreated as bail in respect of any offence in terms of this Act, except in terms of a regulation made by a local authority council or a regional council under section 92 or adopted by it in terms of section 93, shall be paid into the State Revenue Fund". At the onset, this is a general provision and does not distinguish between the types of fines that must be paid into the State Revenue Fund.

Section 16(1)(i) of the RFA Act provides that fines imposed for the overloading of vehicles are to be paid into the Road Fund. This section of the Act is drafted in generic terms, referring to "a law", but it can be deducted that the proceeds from overload fines were included as a source of income to the Road Fund because (a) overloading imposes additional avoidable or unnecessary costs on the road (i.e. there is a rationale to use the fine revenues to recover or pay for the relevant costs), and (b) the control of overloading is a specific function forming part of the road management function in terms of section 16(1)(e) of the Roads Authority Act. In addition, such fines are, as are fines in general, imposed also for purposes of deterring overloading offenders. [See sections 17(1) of the RFA Act and section 16 (1)(a) and (e) of the Roads Authority Act, 1999 (Act No.17 of 1999), which specifically refers to the Road Authority's duty to maintain the road network of Namibia and to take steps to prevent excessive damaging of roads.]

Is section 16 of the RFA Act mandatory or empowering?

The RFA proposed a position that holds section 16 of the Act as an empowering rather than a

mandatory provision, based on the argument that it could not have been the intention that in terms of section 16(1)(f) a donor is forced to pay any donation or grant into the Road Fund. The RFA contends that therefore, section 16(1)(e) should be interpreted as empowering rather than mandatory. This contention cannot be supported, even if, by legal interpretation (based on the presumption that the lawgiver did not intend ridiculous consequences), a somewhat forced conclusion is reached in relation to donor funding [paragraph (f) of section 16(1)].

Section 16 of the RFA Act is, unmistakably mandatory. The introductory sentence, which relates to every paragraph, makes use of the word "shall" which is a clear indication of the intention to establish a mandatory provision. It is quite correct to state that as a policy, whether a donor pays the supplier directly or through the Road Fund, should remain the donor's irrefutable right, but the Act does not reflect that right. The Act should have clearly indicated that it intended exceptions on the rule, or the word "shall" should not have been used in the introductory sentence of section 16. Section 16 is thus not merely an empowering provision, but is mandatory and as such, renders a real conflict in relation to the account into which overload fines must be paid, and should therefore be interpreted in accordance with the rules of interpretation of law.

The General Rule

In the interpretation and resolution of conflicting statutory provisions, the first aim of the interpreter should be the reconciliation of the conflicting provisions.[26] The general rule is if an assessment is made that it is impossible to construe the two statutory provisions together, because of "an inescapable inconsistency between them, then the later statute is usually regarded as impliedly repealing the earlier one, or as amending it to the extent necessitated by the inconsistency"[27]. According to Steyn the amendment is implied and the Legislator does not need to enact an explicit amendment.[28]

In the event of an irreconcilable conflict, the courts make use of two maxims to effect a resolution. These are the *generalia specialibus non derogant* (a general statute should not be interpreted in such a way as to alter specific provisions of an earlier statute or of the common law) and the *lex posterior derogant priori* (a later statute amends a earlier one).

Summary

The accepted manner of interpretation that for the purpose of this document is referred to as the general rule can thus be summarised as follows:

Step 1: Determine whether conflict is real or putative

Step 2: Try to reconcile conflicting statutes or sections

Step 3: If irreconcilable, the later statute or section repeals the earlier with the exception that if the earlier statute or section regulates a specific aspect and the later statute or section regulates general aspects of the same subject matter, both statutes/sections exist as separate entities

[26] Steyn *Die uitleg van wette* 5de Uitgawe 188; Devenish *Interpretation of Statutes* 1992 1st Edition 278
[27] Devenish 280; Krause v CIR 1929 AD 286 at 290
[28] [28] Steyn 188 " Duidelike onbestaanbaarheid van die een wet met die ander is voldoende".

Step 4: Determine if the intention of the Legislator was to regulate the whole subject matter through the later statute or section. If answered in the affirmative, the exception does not apply.

The Maxim *Generalia Specialibus Non Derogant*

An exception to the general rule exists. The exception applies only when the earlier act is a *lex specialis* (a special or specific provision / act). Glück[29] (a common law writer) contends that it should not be presumed that the Legislator intended to repeal the special enactment if it did not make it clear that such was indeed its intention. In such a case, the later general enactment and the earlier special one should be equated with a rule and an exception thereto.[30]

The following case law illustrates the application of the exception: " where there is an act of parliament which deals with in a special way with a particular subject matter, and that is followed by a general act of parliament which deals in a general way with the subject matter of the previous legislation, the Court ought not to hold that general words in such a general act of parliament effect a repeal of the prior and special legislation unless it can find some reference in the general act to the prior and special legislation or unless effect cannot be given to the provisions of the general act without holding that there was such a repeal".[31]

In the decision of Kent NO v South African Railways and another[32] Watermeyer CJ referred to the rule of statutory construction: "that statutes must be read together and the later one must not be so construed as to repeal the provisions of an earlier one. Or take away rights conferred by an earlier one unless the later statute expressly alters the provisions of the earlier one in that respect or such alteration is a necessary inference from the terms of the later statute. The inference must be a necessary one and not merely a possible one".

This principle leads to the same result as the *generalia specialibus non derogant*. In R v Gwantshu[33] the court remarked: "When the Legislator has given attention to a separate subject and made provision for it the presumption is that a subsequent general enactment is not intended to interfere with the special provision, unless it manifests that intention very clearly. Each enactment must be construed in that respect according to its own subject matter and its own terms. This case is a peculiarly strong one for the application of the general maxim per Lord Hobhouse delivering the judgement of the Privy Council in Barker v Edger [1898] AC at 754. Where general words in a later Act are capable of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation, that earlier and special legislation is not to be held indirectly…altered…merely by force of such general words, without an indication of a particular intention to do so."

Following on this classic remarks by the court, the latest South African court case dealing with this matter, the court in SASOL Synthetic Fuels (Pty) Ltd and other v Lambert and other[34] continued: "In such cases it is presumed to have only general cases in view and not

[29] Ausfuhrliche Erlauterung der Pandecten Buch 1 at 514-15
[30] Khumalo v Director-General of Co-operation and Development ANO 1991 (1) SA 158 (A) 164 C to D
[31] In re Smith's Estate (1887) 1 Ch D 589 at 595
[32] 1946 Ad 398 at 405
[33] 1931 EDL 29 at 31
[34] 2002 (2) SA 21 (SCA)

particular cases which have been already otherwise provided for by the special Act. Having already given its attention to the particular subject and provided for it, the Legislator is reasonably presumed not to alter that special provision by a subsequent general enactment unless that intention be manifested in explicit language".[35]

When the exception is not applicable

The exception is not always applicable where the provisions of a later general enactment are in conflict with those of an earlier special enactment. Two instances exist: firstly, the exception is not applicable if the later enactment (in so many words) repeals the earlier one. This is not the case in our legal problem. Secondly, it may be clear that the Legislator intended to repeal the special enactment although no reference was made.[36] To determine the Legislator's intention, the New Modderfontein Gold Mining case stated "It is a familiar rule however, that when a new statute is evidently intended to cover the whole subject (own emphasis) to which it relates, it will by implication repeal all prior statutes on the subject".[37]

Conclusion and application of Theories

Application

The applicable sections:

Section 16 (1)(i) of the RFA Act is the *lex specialis* (specific provision)
Section 109 of the Road Traffic and Transport Act is the general provision

Step 1 All efforts to find a reconciliation between sections 16 and 109, is impossible

Step 2 The general rule states that the later section 109 repeals the earlier section 16 (1)(i)

Step 3 All indication seems to point that the exception to the general rule should be applied. Then, section 109 of the RTTA may not repeal section 16 of the RFA Act,

But, Step 4 Section 109 regulates the whole subject matter of fines

Therefore
In these circumstances section 109 of the RTTA will prevail over section 16(1)(i) of the RFA Act and all road traffic fines, including overload fines must be paid into the State Revenue Fund."

This concludes the extract from Adv. Botha's legal opinion. It needs to be pointed out that an alternative interpretation of the ostensible conflict between section 16(1)(i) of the RFA Act and section 109(1) of the RTT Act is possible. Such an alternative view would indeed be based on the argument that section 16(1)(i) is a specific provision whilst section 109(1) is the general provision and that this is exactly the way in which the *generalia specialibus non derogant* rule should be applied. If this is correct, there is no real conflict.

[35] Par 17 page 30 B
[36] New Modderfontein Gold Mining Co v Transvaal Provincial Administration 1919 AD 367
[37] 397

It is noted that the RFA in its Guidance Document expressed itself as follows: "It could be argued that the levying of such fines is primarily a traffic safety issue, and since traffic safety is primarily the responsibility of the Minister responsible for Transport, and not that of the Road Fund Administration, it could be argued that these fines should indeed be paid to the Minister as provided for in the RTT Act. (The Minister could possibly apportion a part or all of these fines to the RFA in accordance with the provisions of the RTT Act, with the specific instruction to utilise these funds for the defrayment of traffic safety expenses?)"

In this latter regard we wish to point out that the RTT Act, in referring to apportionment, merely does so in the context of fees payable in terms of the RTT Act (see section 111(3)) and not in regard to fines. We infer, further, that the RFA apparently does not wish to make a strong case that the relevant fines revenue should accrue to the Road Fund. From a policy point of view we would concur with such a view, if such is indeed the case.

3.2.2.4 Recommendation

In view of the finding above and the fact that the RFA apparently does not wish to lay strong claim to the fines revenues concerned, we recommend that no amendments to section 16 of the Act be made, except if other amendments to section 16 follow from the recommendations of this Report, in which case we would recommend that section 16(1)(i) be deleted.

3.2.3. Abnormal Vehicle Fees and Mass-Distance Charges

3.2.3.1 The Issue

Abnormal load and abnormal vehicle fees are currently imposed and collected by the Roads Authority (RA) in terms of the regulations under the Road Traffic and Transport Act (RTT Act). The RA acts on behalf of the Minister responsible for transport. Revenues collected accrue to the Central Revenue Fund.

Such fees are also road user charges in terms of the RFA Act and their levels should be calculated in terms of road user charging principles and be imposed in terms of the RFA Act.

Currently the provisions of the RFA Act and the RTT Act would appear to be in conflict. The issues are:

(a) whether the provisions of the RFA Act and RTT Act are in fact in conflict; and

(b) what should be done in order to:

  (i) resolve conflicts, if any;

  (ii) ensure that abnormal and abnormally loaded vehicles pay for road use in an equitable way and in accordance with the costs they cause;

  (iii) channel the relevant road user charges part of the revenues to the Road Fund; and

  (iv) come to an understanding with the Minister responsible for transport whether or not the Minster wishes to continue to collect abnormal vehicle and abnormal load fees in terms of the RTT Act.

3.2.3.2 Discussion

Provided they pay the relevant fees, abnormally loaded or abnormal vehicles are not in contravention of any law and, if the road costs associated with such vehicles are reflected by the fees, an equitable road user charge is in effect being paid.

Section 18(1)(a) of the RFA Act provides for the imposition of the following road user charge for the purposes of the achievement of the objects of the RFA Act:

> "*(a) A charge on any motor vehicle, whether registered in Namibia or not, in respect of the travelling distance in the course of on-road use, and which may be based on the mass, length, width or height of the vehicle or its loading, or the number of axles of such vehicle, or any combination of such factors*".

The charges which would normally be imposed under the above provision of the RFA Act are the so-called "mass-distance charges" (MDCs), sometimes also referred to as "weight-distance charges", on heavy and very heavy vehicles. However, the provision may, and was in fact intended to, be used to recover road user costs associated with the mass and other dimensions, etc. of all vehicles, whether abnormal or abnormally loaded, mainly because of the equity aspects related to the recovery of costs from very heavier vehicles.

The Roads Authority (RA), in terms of the provisions of either section 15 or 16 of the RA Act,[38] performs a number of functions in terms of the RTT Act on behalf of the Minister responsible for transport. One of the functions falling under this arrangement ("The issuing of authorisations under section 99 of the RTT Act") is that of authorising "*the use on a public road of a vehicle which does not comply with the provisions of this* (the RTT) *Act"*.

From the point of view of the RTT Act the purpose of the relevant permit is, in the first instance, to authorise the use of the vehicles concerned (i.e. for road traffic quality regulatory purposes) rather than to impose a user charge. The Department of Transport, however, in the time prior to the Road Sector Reform, followed a policy of setting the relevant permit fees in accordance with cost recovery principles and it is understood that this policy has been continued by the RA. From the point of view of the RA (or the Department of Transport which previously performed the function) "cost recovery" could include the recovery of costs associated with issuing permits and providing traffic police escorts to certain categories of abnormal vehicles.

It is worthwhile noting that the provisions of section 111 of the RTT Act (see subsection (3) of that section) empower the Minister, in contracting with any party for the performance of any function under the RTT Act, to "apportion" the revenue from fees payable in terms of the RTT Act between the State and any such contracting party. Since the Minister has the power to prescribe the relevant fees (in terms of section 91(1)(xxvi) of the RTT Act), i.e. determine

[38] The status of the agreement in terms of which the RA performs the relevant functions is not clear and there is, further, uncertainty whether the Minister has "assigned" the relevant functions, or some of them, under section 16(1)(f) of the RA Act or "contracted" the RA to "advise and assist" him under section 15(1)(c)(ii) of the RA Act. The Minister is assumed to have acted under the provisions of either or both of section 110 (Delegation of powers) or section 111 (Power of Minister to enter into agreements for performance of functions). The provisions of the draft agreement suggest that section 111 was used. See also the discussion on this matter in paragraph 8.2 of this Report.

their rates, it is possible for the Minister to apply cost recovery principles although the RTT Act does not include any provisions in accordance with which the levels of any fees prescribed under that Act should be calculated.[39]

The RFA has to date not attempted to apply the provisions of section 18(1)(a) of the RFA Act for purposes of road use charging. The main reason has been the technical difficulties in measuring the distances travelled by heavy vehicles (cf. *"A charge on any motor vehicle, whether registered in Namibia or not, in respect of the travelling distance in the course of on-road use…"*.)

3.2.3.3 Policy considerations

From a policy point of view the RFA must impose road use (cost recovery) charges associated with the use of the national road network by vehicles. Mass-distance charges (MDCs) are generally necessary as additional (to vehicle registration and licence fees and fuel levies) road user charges on very heavy vehicles to ensure equity between very heavy vehicles and other vehicles since fuel levies are unable to achieve the necessary equity.

The RFA must similarly charge abnormal and abnormally loaded vehicles, in order to comply with the provisions of section 18(3)(a) to (d) of the RFA Act (cost recovery, equity, efficiency in use of resources and non-discrimination).

From the point of view of the RFA, MDCs and abnormal load charges are conceptually very similar. However, because of various technical reasons it is not easy to impose MDCs on relatively large numbers of vehicles. For this reason the RFA will very likely initially impose such charges in a way which would not fit in with the way in which abnormal load fees are imposed (on individual vehicles, on a charge per kilometre basis and upon application).

For reasons as discussed earlier, the Minister responsible for transport should also continue to: (a) authorise the use by vehicles which do not comply with the provisions of the RTT Act of the public roads, and (b) recover costs associated with the issuing of permits, enforcing the conditions of a permit and ensuring road traffic safety.[40]

In our inception Report we summarised the policy objectives of the RTT Act and posed certain questions as follows:

"The RTTA provides for the following:

(a) It sets maximum loads for vehicles in accordance with their carrying capacity and the carrying capacity of pavement, bridges and tyres. These provisions are partly safety measures and partly measures intended to protect infrastructure. It sets overload related offences and fines in accordance with the determination of maximum loads.

(b) It empowers the Minister to authorise the use of a motor vehicle that does not comply with either weight or dimension- requirements against the payment of a fee or

[39] It is interesting to note that the possibility for the Minister to obtain access to and control the use of revenues from fees under the RTT Act only arises when a function under the Act is being performed by another party under a section 111 agreement.

[40] In some instances the vehicle operator concerned may pay traffic police authorities directly (to be confirmed).

compliance with conditions – generally referred to as abnormal loads permits. These functions have been contracted to the Roads Authority and are currently performed by them.

(c) It enables the Minister to make regulations requiring the fitting of vehicles with equipment to calculate/enforce weight-distance charges.

Should general weight-distance charges be implemented, all of the above should be reviewed and amended to unify the regulatory instruments in this regard. Issues that will receive attention are:

(a) Given the implementation of weight-distance charges (or MDCs),

(i) should "abnormal load permits" still be issued or should these authorisations then only relate to equipment and dimensions?

(ii) should overload regulations remain structured as is or should these be reviewed to rather prevent operators from evading the distance charges?

(iii) if so, how will this affect the weigh stations currently being built by the Roads Authority, especially with regard to training of officers and application of the software used?

It is expected that policies with regard to various related issues, other than the technical issues, will have to be developed as part of the work under Part C (of the RUCS Review). These policies should address the equipment costs aspects, the way in which costs should be defrayed, the costs responsibilities of the parties concerned and the law enforcement aspects. The above are regarded as outputs that will be required for purposes of Part A of the Road User Charging System Review."

Finally, it needs to be mentioned that, during the Cape Town Working Meeting held from 6 to 8 May 2004, it was pointed out that there should be sufficient powers for the RFA to implement the necessary administrative system for a MDC levy. These powers could, on the one hand, be said to exist already in section 18(4)'s provision for a Government notice that deals with most aspects of a new road user charge, and the provision for regulations in section 28(c), (d) and (g). However, it would improve matters if the powers are all spelled out in section 18 and in more detail.

It was also mentioned at the Working Meeting that section 18(7) should be extended to enable the RFA to calculate mass as well. Some thought should also be given to allowing the RFA to make use of assumptions/presumptions in their calculations and to extend the section to all kinds of assumptions that may be fair and appropriate in order to enable the RFA to create practical methods of calculation.

3.2.3.4 Conclusions

The provisions of the RFA Act and RTT Act are in our view not in conflict since both the Minister responsible for transport (or the RA if suitably empowered by way of a delegation from the Minister) and the RFA could require the payment, respectively, of a fee (in terms of

section 91(1)(xxvi) or a road user charge (in terms of the provisions of section 18(1)(a) of the RFA Act).

However, it would be impractical and cumbersome if owners of heavy vehicles normally paid the MDCs to the RFA but in the case of abnormal or abnormally loaded vehicles were required to pay permit fees to the RA and the road user charge to the vehicle or its loading to the RFA, i.e. pay the relevant permit fee in terms of the RTT Act and the road user charge in terms of the RFA Act separately. This should be avoided if possible. In our view the matter should be resolved along similar lines as proposed for the vehicle registration and licensing fees and road user charges (see discussion under paragraph 3.2.1 of this Report) to the extent that this is practically possible.

The objectives of the Minister under the RTT Act and those of the RFA in terms of the RFA Act are different and there are specific technical and control implications (e.g. dealing with permit applications, enforcing permit conditions and ensuring road traffic safety) that must be resolved before any action such as amending the legislation can be attempted.

Any actions proposed to be taken by the RFA must be discussed with the Minister responsible for transport.

3.2.3.5 Recommendations

It is recommended that:

(a) the finding that the RFA Act and RTT Act are not in conflict be accepted;

(b) the RFA implement road user charges applicable to abnormal or abnormally loaded vehicles as a matter of principle;

(c) the implementation of "abnormal load charges" be separated from the proposed system of mass-distance charges in view of the fact that such charges will or may be implemented in a way which will not accommodate the specific requirements of abnormal load charges;

(d) the RFA resolve technical and other issues with the Minister and the RA before deciding on the way in which it will implement abnormal load charges;

(e) section 18 be amended to state the RFA's powers to implement the necessary administrative system for a MDC levy in stronger terms; and

(f) section 18(7) be amended to extend the current flexibility provisions of that section to all forms of road user charges and to include the principle that other assumptions/presumptions can be included as well.

4. AMENDMENTS TO LEGISLATION AND REGULATIONS TO BE DRAFTED FOR THE IMPLEMENTATION OF DECISIONS BASED ON THE OUTPUTS OF THE RUCS REVIEW

4.1. General

This Report identifies and makes recommendations with regard to the provisions of the Act which are regarded as necessary to be amended. However, the actual drafting of amendments as such is not attempted herein, except as may be regarded as necessary to illustrate a specific problem.

We will attend to the drafting of amendments to the legislation when the proposals in this Report have been considered by the Client and agreement has been reached about the extent of amendments to be made to the Act.

4.2. Amendments to RFA Act and other Acts

We note the following from the Client's Guidance Document: "Furthermore, from the Terms of Reference it should be clear that the RFA wants to adopt a forward looking approach to address actually experienced as well as potential legal issues in a unified manner, instead of attempting to solve them individually as they might arise over time. The RFA therefore regards it as important to give as much attention to potential legal issues as to those that are actually being experienced as a constraint." and confirm our intention to comply with the guidance therein contained.

We note that other legislation, e.g. the Road Traffic and Transport Act, 1999, may need to be amended and that the policy to be followed (other Ministers, etc.) will have to receive attention.

4.3. Regulations

As far as Regulations are concerned our understanding is that the drafting of regulations in terms of the provisions of the Act, other than those arising from the implementation of MDCs, would fall outside the scope of the terms of reference for the Review of the Legislation.

However, we note that appropriate regulations could be used with considerable benefit to improve the provisions of the Act. We will therefore also in general recommend suitable empowering provisions in the Act with regard to regulations rather than to attempt to provide for unnecessary detail within the Act itself.

We have taken note of the regulations already drafted by the RFA (Disputes and Complaints) and these are discussed elsewhere in this Report.

5. PRIMARY LEGAL ISSUES INVOLVING THE RFA ACT

5.1. Definition of "road sector"

5.1.1. The issue

The RFA Act and the RA Act both refer to the concept "road sector".[41] For instance the objective of both the RFA and the RA is to achieve a "safe" and an "economically efficient" road sector. Neither the RFA Act nor the RA Act defines the concept "road sector". The question is whether a proper definition thereof is necessary.

5.1.2. Discussion

No specific issues or questions are known to have arisen due to the fact that a specific definition of "road sector" was not included in the Act. Although this does not guarantee that no issues may arise in future, the fact that both the RFA and RA have been performing their basic functions for about four years does tend to suggest that no serious problems of interpretation are likely to arise.

When words are not defined in a law, the ordinary rule applies viz. that words are interpreted in accordance with their ordinary ("dictionary") meaning. According to the Oxford Dictionary and Webster's, a "sector" indicates a part of the economy or an industry. This does not bring us much further, but does make it clear that "roads sector" does not only refer to the roads infrastructure as such (see the expression "national road network" in section 1 of the RA Act and "road system" in section 16(5)(a) of the RA Act and section 17(1)(e) of the RFA Act). Within the context of the RFA and RA Acts, it would seem that the following statement that appears on page 7 of the Draft Issues Paper on the Funding Responsibility for the Performance of Road Traffic Regulatory Functions in terms of the Road Fund Administration Act and the Road Traffic and Transport Act is appropriate:[42]

"The use of the expression 'road sector' in the Act emphasises that the objective of the RFA is not defined in terms of the road infrastructure alone but in broader terms. The Act's requirement with regard to 'economically efficient' therefore refers to the road infrastructure as well as to related matters such as vehicle operations. In simplistic terms it is the combination of infrastructure costs and vehicle operating costs which must be optimised in order for the "road sector" to be 'economically efficient'."

It is submitted that the listing of the specific limited category of functions in section 17(1) of the RFA Act which may be funded from the Road Fund does create a practical basis for interpreting "road sector". On account of this provision, it is now possible to say that the concept "road sector" encompasses everything that may be funded from the Fund. Section 17(1) does not only enumerate these, the "fundable" functions, but also asserts that expenditures can only be incurred if they are "to the benefit of the road user".

However, since the RFA has not yet implemented all the rules and principles referred to in section 19(2) of the RFA Act in respect of the funding of functions listed in section 17(1) and,

[41] The RFA Act refers to "road sector" three times, in sections 3, 19(1) and 21(5) and the RA Act only once, in section 3.
[42] See reference no. 8 in Annexure B.

furthermore, since the RFA has not yet provided funding to all the approved authorities concerned, possible problems may arise if and when such approved authorities start to explore the possibilities in the legislation to demand funding or the increase of their share of funding. A typical argument would be the assertion by an approved authority that a specific function performed by it is extremely relevant to the road sector's "safety" and/or "economic efficiency", and that that function should therefore receive more than what the RFA might want to determine on the basis that the function is important for the "road sector" in its wider interpretation. Alternatively, an approved authority may argue that the scope of the said rules and principles should be broadened to cover the funding of activities which the RFA may have excluded from funding in the rules and principles that are now being framed by the RFA.

The above suggests that the RFA is only likely to become involved, if at all, in a "roads sector" interpretation problem when the provision of funding from the Road Fund is at stake. The most likely interpretation problem is related to the interpretation of the expression "safe road sector" (see discussion below).

It is submitted that "road sector" should not be defined in the legislation. It is a broad concept, and perhaps needs to be left "intact", in order to be able to fully do justice to the object of the RFA Act. Again, regardless of how "road sector" is defined, section 17 adequately covers the types of expenditure that may be incurred from the Road Fund, whilst section 19 adequately covers the amount of expenditure that may be defrayed through the RUCS. Any attempt to define the concept "road sector" may create problems where none have yet arisen. The RFA is responsible for: (a) the "regulation" of the funding (i.e. determination of the amount of funding in terms of section 20(4)(a) of the Act) of projects and programmes, which in turn are related to one or more of the functions/expenditures enumerated in section 17(1), and (b) the "provision" of funding for these projects and programmes by way of the imposition of road user charges under section 18(1) of the Act. If any interpretation issues do arise, they are likely to arise within the context of the amount of funding to be provided for one of the projects or programmes related to a section 17(1) function. Such issues should be resolved within the context of the function concerned. Thus, nothing can be funded that is unrelated to the concept "road sector" as understood here.

If any definition of "road sector" is considered, the following guidelines should apply:

(a) the definition should refer to expenditures/functions which should be funded from road user charges, specifically the funding of the national road network; and

(b) the definition should include a reference to road user costs[43] in the sense that expenditure funded by road user charges (the Road Fund) would reduce these costs. These reductions would therefore be road user "benefits" which can be compared to the extent of the funding provided by the Road Fund ("user pay" principle and "economic efficiency" principle).

5.1.3. Conclusion

There is a need to retain the concept "road sector" as a broad one and it should not be defined.

[43] I.e. vehicle operating costs, accident costs, time costs, etc. as contemplated in Part I of the Rules and Principles.

The interpretation of the concept is closely related to the expenditure that the RFA may incur under the different expenditure headings enumerated in section 17(1) of the RFA Act.

5.1.4. Recommendation

It is recommended that:

(a) no definition for "road sector" be included in the RFA Act; and

(b) if any interpretation issues do arise they should be resolved within the context of the section 17(1) function/expenditure concerned.

5.2. Definition of "safe road sector"

5.2.1. The issue

The reference to the RFA's objective to ensure a "safe" road sector in section 3 has in some instances been interpreted as an obligation to assume full responsibility to fund functions such as traffic law enforcement (i.e. functions performed in terms of the Road Traffic and Transportation Act) by traffic law enforcement agencies such as those local authorities which operate Traffic Police components, the traffic law enforcement functions assigned to the RA and the Traffic Police of Nampol.[44] However, the only safety measure about which the Act is specific is section 19(1)(a)(ii)'s reference to compliance with roads standards and measures prescribed under section 16(5) of the RA Act.

5.2.2. Discussion[45]

The provisions of the RFA Act dealing with funding are the following:

(a) Section 17(1) which identifies the expenditure headings for which the moneys in the Road Fund may be utilised,

(b) section 19 which deals with the determination of the quantum of funding to be provided; and

(c) section 20 which deals with the budget process and which, in paragraph (a) of subsection (4), again confirms that the amount of funding should be determined -

  (i) on an individual project and programme basis; and

  (ii) in accordance with the rules and principles framed under section 19(2) and which are actually only extensions of section 19(1).

[44] At the Workshop on the Implementation of a Funding System for Traffic Law Enforcement Agencies held on 16 and 17 October 2002. The Ministry of Home Affairs has also suspended subsidies to local authorities for traffic law enforcement after the RFA Act commenced on the grounds that these subsidies should be paid from the Road Fund.

[45] The ordinary rule of statutory interpretation is that the dictionary meaning of words must be followed. The meaning of "safe" is "free from risk or danger". Unfortunately, this does not bring us much further. The meaning of "road sector" has been discussed in paragraph 5.1.

The RFA has to date interpreted its responsibility to provide funding for traffic law enforcement as being subject to the same basic principles which are applied to the funding of other functions/expenditures,[46] namely -

(a) compliance with economic efficiency principles, i.e. funding is determined in accordance with the benefits accruing to road users (e.g. reduced accident costs experienced by road users resulting from traffic law enforcement[47]) rather than the achievement of a specific "safety" standard or objective, and

(b) the availability of funding (section 20(4)(b)(i) of the RFA Act).[48]

The only specific obligations imposed on the RFA with respect to the quantum of funding to be provided for purposes of the achievement of any "safety-related" objective are those in terms of section 19(1)(a)(ii) of the RFA Act, which states: "*In determining the amount of the funding to be made available through the road user charging system, the Administration shall ensure compliance by the Roads Authority with the road standards and measures prescribed under section 16(5) of the Roads Authority Act*". These standards and measures (see section 16(5) of the RA Act) contain an explicit reference to the achievement of a "safe road system".

The Act does not place a specific obligation on the RFA with regard to traffic safety as such, specifically not the achievement of any defined road traffic safety standard (compare this with the statutory requirements in the said section 16(5) as regards infrastructure safety standards), and the existence of such an obligation must rely on an interpretation of section 3 of the Act, which refers to the RFA's objective in broad terms as follows: "S*ubject to this Act, the object of the Administration is to manage the road user charging system in such a manner as to secure and allocate sufficient funding for the payment of expenditure as contemplated in section 17(1), with a view to achieving a safe and economically efficient road sector*". It is therefore submitted that the RFA, in determining the funding to be provided for the traffic safety functions in section 17(1), namely those under paragraphs (d), (e) and (f), should only be subject to section 19 of the RFA Act. In this regard the following is of relevance:

(a) For the purposes of according concrete interpretations to section 19(1), the RFA must frame rules and principles under section 19(2) which shall, for the purposes of the most effective achievement of the objects of section 19(1), be applied by approved authorities in proposing a new project or programme for funding; and

(b) section 19(1), and hence section 19(2), is subject to the RFA's determinations under

[46] See, however, the later discussion of the funding of urban road maintenance that may have to be approached differently.

[47] This implies that benefits that may be derived by parties other than road users will not betaken into account in determining the Road Fund's share of funding although such benefits should be taken into account in determining the total funding requirements for traffic law enforcement and the source of funding which is required additional to that provided by the Road Fund. See the minutes of a meeting held between the RFA and local authorities on 17 February 2004.

[48] Recently the question has arisen whether, when the RFA during a particular period, does not determine the funding it should (i.e. in terms of section 20(4)(a)) on grounds of inadequate resources (i.e. in terms of section 20(4)(b)(i)), a funding obligation nevertheless remains and whether the RFA should then provide the necessary (compensatory) funding during a later period. See the reference to this problem towards the end of this paragraph and the discussion of sections 20(4)(a) and (b) of the RFA Act in paragraph 5.6 of this Report.

section 17(2).

It is further submitted that the RFA is, in accordance with the introductory sentence of section 17(1), obliged to provide funding for all the expenditures listed in that section but that this obligation cannot be interpreted as that the RFA must necessarily assume responsibility to be the only funding source in respect of the functions concerned.[49]

The main problem with the funding of the above functions (see the Issues paper on the Funding of Traffic Regulatory Functions) is that the standards for traffic safety could only be regulated under the Road Traffic and Transport Act, 1999 (Act No. 22 of 1999), and that the RFA Act does not oblige the RFA to fund to a level where it ensures compliance with such standards, but only the standards contemplated in section 19(1)(a)(ii) of the RFA Act. The Road Traffic and Transport Act also does not explicitly provide for the "user pay" principle, although section 111(3) of that Act does provide that fees imposed in terms of the Act may be apportioned between the State and parties contracted to perform functions under the Act. Even if that Act did provide for such a principle, it would not necessarily identify road users as being the sole beneficiaries of the functions performed under the Act and hence that the RFA should therefore provide all funding. Since that Act does not necessarily indicate road users as the sole beneficiaries of performance of the functions under the Act, it is submitted that the RFA could, in any event, not fund the full extent of the functions performed under that Act. Moreover, the fact that sections 19(1)(b) and 20(2)(d) and (4)(b)(iii) refer to moneys that may accrue to the RA or other approved authorities from an appropriation made by Parliament, etc. indicates that the RFA was not regarded as the sole provider of road sector funding.

Notwithstanding the above views, this could remain a contentious issue. Not all of the RFA's proposed section 19(2) rules and principles for the funding of traffic law enforcement have not yet been released and exposed to comment and therefore it is difficult to at this stage fully gauge the viewpoints of the relevant approved authorities. On the basis of the minutes of a meeting held between the RFA and local authorities on 17 February 2004 it is, however, evident that strong views are held concerning the RFA's responsibilities to provide funding for traffic law enforcement expenditures incurred by local authorities who operate traffic police components. A part of the problem arises from the fact that the relevant local authorities were traditionally provided with a State subsidy calculated in accordance with an agreed formula. The Ministry of Home Affairs, which was in the past responsible for the

[49] If proper effect is given to the provisions of the Act, more particularly the economic efficiency provision in section 19(1)(a)(i) and the provisions of any maximum amount of funding determinations made under section 17(2) (but see proposals in this Report about this subsection), it may mean that the RFA is not obliged to undertake to fund all the expenditure of approved authorities such as those local authorities which operate Traffic Police components, the RA when it performs assigned or contract functions under the Road Traffic and Transport Act or the Traffic Police Component of Nampol in the Ministry of Home Affairs. Government must fund any further needs in a co-operative fashion. This would entail that Government should be empowered to determine the optimum level of cost in relation to traffic law enforcement, adjudication and education. Having determined the optimum level, the amounts could be determined and the Ministries that will benefit from the reduction in fatalities could submit a motivated estimation to Parliament to obtain funding for the portion of the "three E's'' (engineering, education and enforcement) functions that cannot be justified on terms of economic efficiency (e.g. the Ministries responsible for health, home affairs and works and transport). A less complicated alternative could be that the optimum level of funding be determined by the RFA as required in terms of its Act, but that the Act be slightly amended to allow that the optimum levels of funding for the "Three E's" be determined taking into account all factors as indicated above, as well the benefit to the economy in general. The portion that is to the benefit of other road users alone should then be determined and should be factored into the user charges (as is currently the case).

payment of the subsidies, unilaterally suspended payment of the subsidies when the RFA was established in 2000 in view of its interpretation that the RFA had become responsible for the said subsidies. During the above-mentioned meeting reference was made to an agreement in terms of which local authorities provide traffic policing services and the compensation they should receive. It may be necessary to obtain details of such agreements and to determine the status and parties who have responsibilities in terms of such agreements. This will in particular be necessary to consider the claims of local authorities that the RFA should retroactively fund traffic law enforcement during the period 2000/01, 2001/02 and 2003/03 (see minutes referred to in footnote 44). These matters are envisaged to be referred to a Senior Counsel for an opinion and will be addressed when such an opinion is received.

5.2.3. Policy aspects

From a policy perspective the RFA is obliged to ensure the achievement of an efficient road sector. In addition to that, the RFA Act obliges the RFA, under section 17(1), to fund a function such as traffic law enforcement to the extent that "it is to the benefit of road users".[50] Only such part of the above functions should therefore be funded from the Road Fund as are clearly performed for the benefit of the road sector (i.e. road users).

Section 17 therefore provides the basis for determining *which part of* the relevant functions should be funded from the Road Fund (e.g. not necessarily activities such as attending to parking offences, escort services to VIPs, etc.). The *quantum* of any funding should, however, be determined in accordance with section 19(1)(a)(i) of the Act.

5.2.4. Conclusion

As is the case with regard to the concept "economically efficient" in relation to the road sector, the RFA Act also does not define "safe" in relation to the road sector. The Act does, however, oblige the RFA, under section 19(2), to "frame" rules and principles, which shall, for the purpose of the most effective achievement of the objects of section 19(1) in the utilisation of the Road Fund, be applied and followed by every approved authority in proposing a new project or programme. The objects in section 19(1) are (i) the achievement of an economically efficient road sector, and (ii) compliance by the RA with the previously referred to prescribed ("safety") standards and measures relating to the "management of the roads comprising the national road network".[51]

It is therefore concluded that the RFA Act refers to a "safe" road sector only in the context of the national road network and that for purposes of determining funding of road safety or road traffic functions, funding must be quantified in terms of economic efficiency principles which are given content by the rules and principles which the RFA must frame in terms of section 19(2) of the RFA Act.

In our view there is from a strictly legal perspective no need to amend the Act, but in order to ensure that no misunderstanding arises it should be considered, after consideration of other issues discussed in this Report which relate to this issue, to amend the Act so that greater clarity is ensured and to reinforce the point that the management and regulation of road safety

[50] See, however, the discussion of this problem in paragraph 5.3 below.

[51] It should be noted that the relevant prescribed measures and standards are applicable to the national road network and do not apply to urban roads or to approved authorities other than the RA.

is not a primary responsibility of the RFA.[52]

5.2.5. Recommendation

It is recommended that no definition of "safe" in relation to the road sector be included in the Act but that amendments to the Act arising from this Review should seek to ensure greater clarity about the intentions of the Act with regard to road safety.

5.3. Section 17 (1) of the RFA Act: funding of infrastructure and non-infrastructure (traffic) functions

5.3.1. The issue

This discussion focuses on the funding of approved authorities other than the RFA and the RA.

There are two issues which will be addressed:

(a) the expression "to the extent that it is to the benefit of road users". (Should this be interpreted as referring to a principle which must be applied by the RFA in determining the quantum of funding to be provided by the RFA?); and

(b) he way in which the various paragraphs are formulated, namely the significance of words such as: "to defray the costs of " and "to make contributions to", etc. (Should this be interpreted as that the RFA should in some cases provide all funding required by the approved authorities concerned and in other cases only part of the funding?)

5.3.2. Discussion

The expression "to the extent that it is to the benefit of road users" in the introductory sentence of section 17(1) is perceived by some as providing a principle in accordance with which the "quantum" of the amounts of funding to be provided from the Road Fund under, specifically, section 17(1)(c), (d), (e), (f) and (g) should be determined.

An alternative view is that section 17 deals with the identification of the "types" of expenditure for which the Road Fund may be utilised and not the quantum. Section 19, specifically, deals with the "amount" or quantum of funding to be provided under the Act. This view is strengthened by the fact that section 20 of the Act, which deals with the budgeting process, refers to section 19 and the rules and principles under section 19(2) of the Act for purposes of determining the amount of funding to be approved.

It can be argued that, whatever interpretation is accepted, the basis for evaluating projects and programmes (see section 20(4)(a) of the Act) remains the rules and principles under section 19(2) of the Act and that the "economic efficiency principle" followed in the rules and principles is in essence nothing else but an approach based on "to the extent that it is to the benefit of road users". Therefore, whatever interpretation is accepted, the funding or projects and programmes will eventually be dealt with similarly. However, the expression has

[52] See also the discussion in paragraphs 5.5.2 and 5.6.2 of the funding problem that arises when the "economic efficiency" principle and the "safe" road standards and measures have to be applied simultaneously.

generated misunderstanding and an amendment of the Act should therefore be considered.

It is submitted that the expression "to the extent that it is to the benefit of road users" in section 17(1) should preferably be understood as a principle for determining whether a particular type of expenditure (or the performance of a particular type of function), should be supported by revenue generated through road user charges and, if yes, whether it should be funded in whole or partially, depending on the "extent" to which the type of expenditure or type of performance of the function to be funded is of benefit to road users. An example is the performance of traffic law enforcement functions (section 17(1)(e) of the RFA Act) by various local authorities and by the Traffic Police Component of the Namibian Police (Nampol) in the Ministry of Home Affairs. Road users (or the road sector) are undoubtedly beneficiaries of traffic law enforcement but not necessarily the sole beneficiaries. It is therefore necessary to examine in detail what the activities and functions of traffic officers are and to only use the moneys in the Road Fund to defray the costs of such types of activities performed by traffic officers as are clearly to the benefit of road users. Activities relating to the provision of VIP escort services, the regulation of cross-border road transport, attending to parking offences within a local authority area, etc. should not necessarily be funded or fully funded from the Road Fund because in such instances there are parties other than road users who can be regarded as the beneficiaries of the services provided by traffic law enforcement officers.

As in the case of section 19(1), section 17(1) is also subject to section 17(2). Whatever interpretation is placed on section 17(1), funding remains subject to the RFA's determinations under section 17(2). Section 17(2) is discussed hereafter and any decisions about section 17(1) should be taken only after considering the recommendations with regard to section 17(2).

The expressions "to defray the costs of " and "to make contributions to" that appear in the introductory words of a number of paragraphs of section 17(1) may create the impression that some of the expenditures qualifying to be funded from the Road Fund must be fully funded from the Road Fund, whilst in the case of other expenditures, only a portion must be paid, thus amounting to a "quantum" indication". Again, the principle should be that, in order to avoid confusion, quantum indications should only resort under section 19. It follows that these expressions should either be deleted or, if there are good reasons for retaining the principle behind them, they should be written into section 19.

Our final proposals for the improvement of section 17(1) are that:

(a) provision should be made in section 17(1) for claims (of any nature) against the RFA, similar to the present provision for claims against the RA (section 17(1)(*l*)); and

(b) provision should be made for the definition of the term "traffic related maintenance" in section 17(1)(c)(ii) in order to avoid any interpretation problems on the meaning of that expression. Meanwhile, the RFA should in any event only pay those items that will contribute to the economic efficiency of the road sector. Section 17(2) (as the text currently reads) can be used to put a "cap" (or limit) on specified items, especially where there is the likelihood of "external benefits" that accrue to other sectors.

5.3.3. Conclusions and recommendation

There should be no terminology in section 17(1) that may create the impression that quantum indications are being given by the expressions "to defray the expenditure of" or "to make contributions towards".

Secondly, the words "to the extent that it is to the benefit of road users" should not be interpreted as playing a role when the amount of funding to be provided is determined. The Act should be amended to more clearly confirm that these words apply to the determination of the "types" of expenditure which are eligible to be funded from the Road Fund. Such a provision could be included as a new subsection (3) of section 17.

5.4. Section 17 (2) of the RFA Act

5.4.1. The issue

Section 17(2) of the RFA Act provides for the mandatory determination (cf. the word "shall") by the RFA, of the "*types and maximum amounts of expenditure*" which may be incurred with regard to most of the funding of the expenditures under section 17(1), namely paragraphs (c) to (g) and (n). The funding of the national road network and the RFA's own administrative expenditure is excluded. Both section 17(1) and section 19(1)(a)(i) are "subject to" section 17(2). This means that the section 17(2) determinations are definitive, even overriding the "economic efficiency" principle of section 19(1).

Section 17(2), read with section 17(1), creates some problems:

(a) The section deals with both "type" of and "quantum" of funding determinations while section 17(1), which concerns the utilisation of the Road Fund, should rather only focus on the "types" of funding for which the Fund should be used; and

(b) the "quantum" of funding determinations touch directly on the RFA's basic funding regulatory function and it now seems that it is inappropriate to provide in the legislation for powers of the RFA to be able to take what appear to be rather arbitrary decisions about funding.

The issue is to, firstly, find an acceptable solution for how the RFA must deal with funding determinations in instances where economic efficiency criteria must continue to be applied but where the practical implementation of this principle is difficult and, secondly, to better position the provisions on quantum determinations within the Act.

5.4.2. Discussion

The current text of section 17(2) provides as follows:

> *"(2) The Administration shall, after compliance with such consultation procedures as may be determined by the Minister, determine the types and maximum amounts of expenditure which may be incurred in terms of paragraph (c), (d), (e), (f), (g) or (n) of subsection (1)."*

It must be clear that the determination of types of expenditure is a "true" section 17 power because the section pertains to the various kinds of expenditure that may be incurred, but that the second part ("maximum amounts") is directed towards establishing the quantum of an amount of funding and should rather be transferred to section 19.

However, it is not recommended that the "maximum amounts" provision be merely written into section 19 without further ado. The original intention must be reconsidered. This was to take the RFA's amount of funding determinations for certain types of expenditures, i.e. those for which the "economically efficient" funding level is difficult to determine, out of contention by giving the RFA a final or "subjective" discretionary power to make a "maximum amount" determination. In cases where it is relatively straightforward to apply the "economic efficiency principle" of section 19(1)(a)(i) it will be inconsistent with the objective of the Act if we were to allow an apparently discretionary or subjective "maximum amount" determination to be made rather than to make the determination in accordance with quantified values for identified economic benefits. It is only when quantification of the values of benefits is difficult and reasonable efforts have failed, that the method of "maximum amounts" should be permitted. It is therefore submitted that the "maximum amount" provision, as it currently stands in section 17(2), goes too far and would potentially expose the RFA to criticism that it does not apply the basic principles of its own legislation. The word "maximum" also has the connotation of being a "cap" or limit to what the RFA will provide in terms of funding rather than being its "considered, fair and reasonable" estimate of what the value of a relevant benefit in fact should be.

It should be noted that the determinations created by the exercise of the RFA's power under section 17(2) are in fact rules formulated in advance that prescribe what the maximum applicable amount of funding should be in a given case. It is submitted that what is really required is not rules but a circumscribed power which is subject to prescribed procedures that enable the RFA to make a particular (ad hoc) section 20(4)(a) ("amount of funding") determination in cases where the application of the economic efficiency principle is difficult and where the RFA could experience serious delays if it were to become involved in lengthy consultations with approved authorities qualifying for funding from the Road Fund.

It must, however, be conceded that some of the types of expenditure referred to in section 17(2) that may be incurred in terms of section 17(1), i.e. those contemplated in paragraphs (c)("urban roads"), (d)("traffic information systems"), (e)("traffic law enforcement"), (f)("vehicle and driving testing") and (g)("road research"), are indeed examples of types of expenditure in respect of which it may be difficult to find clear-cut answers through the mere application of the "economic efficiency" principle. But what is the real need in these "difficult cases"? It is submitted that what the RFA should do in those cases is not so much to define a maximum (i.e. a "cap"), but to determine an amount which can reasonably be justified as representing the result of a process or procedure to apply the principles of economic efficiency. Such an amount would, of course, at the same time represent an upper limit of what the RFA will fund (under conditions of adequate resources).

If it were not for the consultation provision in section 17(2), the section may appear as an attempt to confer an arbitrary, unilateral power on the RFA. Such types of powers are to be avoided in a modern democratic state where the "rule of law" principle determines that one should not create room for unpredictable powers but that all situations should rather be governed by the application of clear rules. It is, however, acceptable to provide for proper and fair procedures that must be followed as a safeguard against abuse of the power and it

would be appropriate to provide for these procedures in the Act itself. The re-writing of the present power within a proper new framework will go some way towards providing the RFA with a more defensible position where the exercise of the power is tested in a court of law.

5.4.3. Conclusion

It is therefore concluded that subsection 17(2) should be amended to remove the reference to the determination of a maximum amount (since this is a "section 19 matter") and that a new subsection (3) be added to section 19 to provide for cases where the economic efficiency principle is difficult to apply. The proposed new subsection should provide for the following:

(a) The conferring of a "special power" upon the RFA to reach finality on a determination of funding to be made under section 20(4)(a). We note that if we stopped here it would in essence not really establish anything different to the approach of the current section 17(2) in the Act and which we believe, as pointed out above, would not be consistent with modern "rule of law" principles. For that reason the conferring of a "special power" should not be done in a way which conveys the impression that a purely subjective decision-making mechanism is being created but rather one which is seen and accepted as providing the interested parties with a way out of a deadlock situation and where the eventual result can at least be defended on the basis of the process that was followed. The current section 17(2) only requires consultation before determination. However, if a prescribed procedure is followed it will also make it difficult for any party to challenge the RFA's relevant determinations.

(b) Therefore the "special power" is only to be exercised in instances where attempts to apply the "economic efficiency" principle in a practical way fail to lead to conclusive answers and it is necessary to bring the matter to a final conclusion. However, this qualification in itself raises a question: Should such "instances" be identified in the Act, e.g. funding under section 17(1)(c) to (g) and (n) or should there first be a determination whether or not a particular instance qualifies to be treated by way of the "special power"? If yes, should the power vest in the RFA to take this decision? We believe that it would not be a good idea to open the door to debate about whether or not a particular type of expenditure qualifies to be dealt with by way of a "maximum amount" determination. This could seriously delay matters and we therefore suggest that those expenditures previously falling under section 17(2) should continue to do so but that the RFA need not be obliged by way of a "shall" to make "maximum amount" determinations in all instances, as is currently the case, but rather be empowered by way of a "may". This would leave the discretion with the RFA whether or not to invoke the "special power". In this regard it should be noted that funding under section 17(1)(a) (management of the national road network) and section 17(1)(b) (administrative expenditure of the RFA) are excluded from the present "maximum amount" determinations under section 17(2). Should this continue to be the case? We believe that the answer is yes. Firstly, the RFA is not going to enter into debate with anyone about its own administrative funding. Secondly, the concept of a "maximum amount" (which is assumed to be an "overall" maximum amount) would not make much sense in the case of the funding of road network management where major road projects must of necessity be evaluated on individual merit as and when they are submitted. Therefore such a concept can at most find application in respect of specific new road projects as they come up for evaluation and possibly in respect of the total

national road network maintenance programme.[53] However, the funding of functions such as the operation of a traffic information system, traffic law enforcement and adjudication, etc. where the RFA is not the "regulator" or sole "provider" of funding (as it is essentially for roads) creates a different situation. The concept of a previously determined amount of funding support to be provided from the Road Fund should generally be welcomed by the approved authorities concerned in view of the stability it would create (depending of, course, whether the RFA is able to muster the "economically efficient" level of funding).

(c) Therefore the reference in section 17(2) to paragraphs (c), (d), (e), (f), (g) and (n) of section 17(1) should continue to appear in the new provision.

(d) The exercising of the "special power" should be subject to procedures, such as that:

(i) The concerned approved authorities' have had the opportunity to submit substantiation with regard to compliance with economic efficiency principles:[54]

(ii) there has been consultation between the interested parties on the basis of any submission under (i) above; and

(iii) the RFA has given due consideration to the proposals and information submitted to it before making a determination which in its opinion reflects a fair and reasonable funding determination complying with the objects of the Act under the specific circumstances.

5.4.4. Recommendation

It is recommended that the RFA consider the proposals with regard to section 17(2) of the Act, namely that:

[53] At the Working Meeting held in Cape Town the Client indicated a need to be able to make final funding determinations in cases where the general models for substantiating "economic efficiency" failed to provide a right answer in respect of an amount of funding determination. As an example was mentioned the case of a specific road project which, when analysed with the usual models operating with statistically derived data, did not yield the right answer. Statistically derived data could ignore "outlier" points within the sample of data and in this way lead to unacceptable results. It was suggested that there was a need for the RFA to have the power, such as is currently found in section 17(2), to be able make a "capping" funding determination. It was understood that what is in effect required is a power to deviate from the models incorporated in the section 19(2) rules and principles even in cases where "economic efficiency" is usually able to be substantiated by generally accepted analysis models. We have not specifically provided for such a power in our proposals since we believe that the rules and principles in themselves should contain provisions which ensure that special cases can be adequately dealt with. After all, if there is clear and substantive evidence that a general model or formula does not work in a specific case, then the basic principles of the Act (the economic efficiency principle) would be applicable and ensure that the necessary steps can be taken to ensure a correct funding determination. The provisions which are being considered here must therefore deal with cases where there are no generally accepted models or methods to determine economic efficiency in generally accepted quantitative terms. They will also be aimed at the determination of up front "overall funding amounts" for a specific type of expenditure under (c) to (g) and (n) or for rather than for specific projects or programmes to be funded within an expenditure above (see Rules and Principles referred to in footnote 2).

[54] For example the RFA's draft rules and principles for traffic law enforcement require such details (see paragraph 5(2)(a) of the draft Rules and Principles on Traffic Law Enforcement and Adjudication dated 10 March 2004).

(a) the "type" of and "maximum" amount determinations be split with the latter being transferred to section 19;

(b) the new section 17(2) only provide for the determination of the "types" of expenditure which may be included in any expenditure under section 17(1)(c) to (g) and (n);

(c) a new section 19(3) be created to provide for the powers and procedures as proposed above and that these be applicable in respect of the expenditures under section 17(1)(c) to (g) and (n);

(d) any funding determinations made under the new subsection 19(3) be made applicable to any rule and principle under subsection 19(2) in order that the reference in section 20(4)(a) to the rules and principles under section 19(2) be taken to include a reference to subsection 19(3).

5.5. Section 19 (1) and (2): "Economic efficiency" of the road sector

5.5.1. The issue

The issues which will be addressed are:

(a) Whether or not a definition of an "economically efficient road sector" should be provided in the Act since the Act currently merely refers to this concept without defining it;

(b) the fact that the Act, in section 19(1)(a), requires simultaneous compliance with the economic efficiency principle and the roads standards and measures prescribed by the Minister responsible for transport (see subparagraphs (i) and (ii) of paragraph 19(1)(a) respectively); and

(c) the need for the RFA to be able to exercise a special discretionary power in instances where attempts to apply the "economic efficiency" principle in a practical way fail to lead to conclusive answers regarding the amount of funding to be provided under section 20(4)(a) and it is necessary to bring the matter to a final conclusion.

5.5.2. Discussion

Section 19 of the Act ("Determination of amount of funding") states:

> *"19. (1) In determining the amount of the funding to be made available through the road user charging system, the Administration shall -*
>
> *(a) ensure -*
>
> *(i) subject to section 17(2), the achievement of an economically efficient road sector; and*
>
> *(ii) compliance by the Roads Authority with the road standards and measures prescribed under section 16(5) of the Roads Authority Act; and*

(b) have regard to -

(i) any moneys accruing to the Roads Authority or any approved authority by virtue of an appropriation by Parliament, or any grant or donation made by any person, body or authority, in respect of any project or programme, or accruing from any other source other than under this Act; and

(ii) the estimated value of any assets, equipment, human resources and other relevant resources which are or will in all probability be at the disposal of the Roads Authority or an approved authority,

which may effect the determination.

(2) The Administration shall, after compliance with such consultation procedures as may be determined by the Minister, frame the rules and principles which shall, for the purposes of the most effective achievement of the objects of subsection (1) in the utilization of the Fund, be applied and followed by the Roads Authority and every approved authority in proposing a new project or programme or an administrative expenditure referred to in section 20(4)."

As far as the first issue is concerned, namely whether or not a definition of "economically efficient" in relation to the road sector should be included in the Act, we note that the Client has expressed a preference against such a definition.[55] No proposal was made, at the Working Meeting held from 6 to 8 May 2004 in Cape Town, to define the "economic efficiency" principle. The official viewpoint therefore appears to be that the rules and principles framed under section 19(1) must be utilized to give effect to the meaning of "economic efficiency" in concrete cases. We concur with the above view. Accordingly we have not made any recommendations to amend the Act in this respect. We recognise, however, that considerable further debate about this matter is possible, in particular because this is a sensitive matter which directly relates to the rates of road user charges. However, we have regarded further discussion of this as a matter falling outside our terms of reference for this Report.[56]

It is, however, recommended that the section 19(2) rules and principles should be extended to include rules and principles that promote the effective application of funds by the RA and approved authorities. Although similar matters must be included in the RA's procedures agreement (section 17(1)(a)(ii) of the RA Act), these measures would in any event not apply to the approved authorities.

The second issue has to date not received particular attention. This is possibly because the relevant standards and measures have not yet been prescribed by the Minister responsible for transport. It may also be because possible problems, if these "standards and measures" were

[55] In a letter dated 24 March 2004 Mr Seydack of the RFA wrote: "Regarding the interpretation of 'economic efficiency', the Act perhaps justly doesn't provide a guideline, because guidelines risk being 'mindlessly' interpreted according to the specific wording used, instead of being interpreted against the principles which the wording tries to explain.

[56] It must be kept in mind that the draft rules and principles framed under section 19(2) do contain some provisions on the meaning of "economic efficiency".

to be used to compel the RFA to provide "economically inefficient levels of funding" for the maintenance of low traffic roads constructed in terms of section 16(4) of the RFA Act[57] , have not yet surfaced. The issue is the fact that the RFA, in accordance with section 19(1)(a), must give effect to two possibly conflicting provisions at one and the same time. Compliance with the roads safety standards of the Transport Minister referred to in section 19(1)(a)(ii) may under certain circumstances (e.g. very low traffic roads) result in non-compliance with the requirement that the funding provided by the RFA must ensure the "achievement of an economically efficient road sector". This issue is discussed in paragraph 5.6.2 below as part of the discussion dealing with section 20(4)(a) determinations.

As far as the third issue is concerned, namely whether there is a need for the RFA to be able to exercise a special discretionary power in instances where attempts to apply the "economic efficiency" principle in a practical way fail to lead to conclusive answers, reference should be made to paragraph 5.4.2 of this Report where it is proposed that the power of the RFA in section 17(2) to determine maximum amounts of determination, be converted into such a special discretionary power.

5.5.3. Conclusions and recommendations

It is recommended that –

(a) no statutory definition of the "economic efficiency " principle be attempted at this stage;

(b) the way in which a possible conflict between the "economic efficiency" principle and the requirement that the Transport Minister's roads standards be met, should be reviewed with reference to the arguments advanced in paragraph 5.6.2;

(c) the need for a special discretionary power to make determinations of amounts of funding in difficult cases be decided with reference to the arguments advanced in paragraph 5.4.2.

5.6. Section 20(4)(a) and (b): "Amount" and "manner" of funding determinations

5.6.1. The issue

The issue has been comprehensively defined in the document: "Guidance to Consultants Regarding Project Execution" dealing with Part A of the Review as follows:

"According to section 20(4)(b), the RFA shall make a determination of the manner in which the amount of funding determined under paragraph (a) thereof is to be allocated to each project, programme or administrative expenditure (for ease of discussion, the focus will further mainly be on projects) in respect of each of the years within the 5-year budget period. That is, the full amount of funding as determined under paragraph (a) must be allocated in accordance with paragraph (b) within the 5-year budget period. There is no provision whatsoever that would allow a part of the amount as determined under (a) to be allocated in terms of paragraph (b) outside the 5-year budget period."

[57] The so-called "social roads" not funded out of the Road Fund.

A number of numerical examples were given.

The Consultant is required to reconcile the aforementioned interpretation with the wording, or such re-wording as may be necessary, of sections 20(4)(a) and (b), and it is required that the Consultants present a proposal to this effect.

Since section 20 deals with the budget process, which is a particularly important part of the function of managing the road user charging system (see the definition of the road user charging system in section 1 of the Act), we will, in dealing with this issue, also review other provisions of section 20 which have a bearing on the budget process.

5.6.2. Discussion

Section 20(4) of the Act provides as follows:

> *"(4) The Administration shall, after evaluation of every budget submitted to it in terms of subsection (1) and after consultation with the Roads Authority and every approved authority concerned, and after evaluation of the Administration's own funding requirements -*
>
> *(a) determine, with due regard to the rules and principles contemplated in section 19(2) and the provisions of the procedures agreement contemplated in section 17 of the Roads Authority Act, the amount of funding to be made available in respect of every project or programme or administrative expenditure;*
>
> *(b) determine, with due regard to -*
>
> *(i) the funds as contemplated in section 16(1) estimated to be at the disposal of the Fund, including the reserve fund contemplated in section 17(1)(k);*
>
> *(ii) the avoidance of substantial increases in the rates of road user charges in any one year and, in the longer term, the maintenance of a reasonable stability, in real terms, in the rates of road user charges;*
>
> *(iii) any moneys accruing to the Roads Authority or the approved authority concerned from any source other than under this Act in connection with any project or programme or its administrative expenditure and, to the extent that it may affect the making of an allocation, the value of any assets, equipment, human resources and other relevant resources which are or will in all probability be at its disposal; and*
>
> *(iv) the amount required to fund each project or programme referred to in subsection (2)(b),*

the manner in which the amount of funding referred to in paragraph (a) is to be allocated in respect of the ensuing financial year and each of the four financial years following thereafter."

It was pointed out above that section 20 of the RFA Act deals with the budgeting process and that this process is dictated by the definition of the road user charging system in section 1 of the Act, specifically as regards the reference to the "sequential" nature of the determinations in respect of (a) the "amount of funding", (b) the "manner of funding", and (c) the rates of road user charges.[58]

In view of the "user pay principle", i.e. the principle that costs should be fully recovered from road users by way of road user charges, the "manner of funding" determinations and the determination of the rates of road user charges are, in a short term context, merely different sides of the same coin. It is only if there are considerable cash flows in respect of either loan disbursements (cash inflows) or loan repayments (cash outflows) in a given year that there may be significant differences in the total amount of revenue from road user charges and the total "manner" of funding allocations for that year. In a longer-term context total expenditure and total revenue from road user charges must, by definition, be in balance.

A thorough understanding of the basic nature of the road user charging system is necessary in order to address this issue. Moreover, other issues addressed in this Report must be addressed on the basis of the above definition of the road user charging system. For example, if the sequence required in terms of the Act were to be changed so that the rates of road user charges were to be determined first rather than last, e.g. because of so-called "affordability" considerations, it would in reality imply that the amount of funding to be made available is not determined in accordance with mandatory economic efficiency considerations, but in response to perceptions of "affordability" or "acceptability". This would then in effect become the guiding rule for the regulation of funding.[59] If road (and related) funding were to be approached in the latter way it would bring about a quantum leap in the basic nature of the road user charging system. In effect it would mean that "perceptions" as to affordability would replace a scientific, quantitative approach designed to give road users as a group, and the country in general the optimum (i.e. lowest cost) combination of infrastructure and vehicle operating costs.[60]

Section 20(4)(b) of the Act introduces an important principle which affects the budgeting process, namely that the rates of road user charges should be reasonably stable in real terms in

[58] Section 15(1)(a) to (d) could be improved by rearranging the sequence to coordinate with the correct sequence in which the road user charging system functions. This would mean that paragraph (a) of section 15(1) must become paragraph (d), paragraph (b) must become (c), paragraph (c) must become paragraph (a) and paragraph (d) must become (b). The introductory sentence could read "Subject to the provisions of this Act, the Administration shall manage the road user charging system by performing the following functions:".

[59] The road user charging system in New Zealand, which was studied as part of the process of developing Namibia's road user charging system, is based on the approach whereby Government first sets the road user fuel levy. See no. 10 in the Annexure, section 3.3.2, p. 16.

[60] It must be noted that the "quantitative" approach can be applied to determinations of the amounts of funding to be provided to road projects and programmes (by way of the HDM-4 Model for example) but that the funding of functions such as traffic law enforcement and road safety promotion, where scientific quantification of the value of benefits is difficult if not impossible, may also have to be based on "perceptions" as to the amounts of funding to be provided. To assist in such an approach the relevant rules and principles (in terms of section 19(2)) provide the option that funding amounts may be determined on a per vehicle per annum basis. See also the proposed amendments to section 19 in this regard.

the longer term (see subparagraph (ii) of section 20(4)(b)). The implications of this principle on the budgeting process as a whole is perhaps greater than may be realised. A specific implication is that the RFA cannot properly evaluate annual budget submissions, particularly for the management of the national road network, within the relatively short-term time frame of a five-year business plan. For this reason the section 19(2) rules and principles for management of the national road network make provision[61] that annual budget submissions must be guided by a master plan of the Authority which shall contain particulars of (a) every road project and programme proposed to be implemented by the Authority in the medium to long term which is "economically efficient" and (b) the total funding required in respect of each such project and programme in real terms.[62]

Against the above background the RFA is required, in terms of paragraph (a) of subsection 20(4) of the RFA Act, to make a determination of the "economically efficient" amount of funding to be made available in respect of each and every project and programme and administrative expenditure submitted to it by an approved authority in its budget submission. This determination is obligatory, i.e. the RFA must make such a determination and with regard to each and every project and programme submitted to it.[63]

There is no limitation with regard to the number of projects and programmes which may be submitted by an approved authority, in other words there is no limit to the total amount of funding for which an approved authority may apply, provided that only projects and programmes which comply with the rules and principles framed by the RFA under section 19(2) of the RFA Act, i.e. projects and programmes which comply with the requirement that they are "economically efficient", may be included in a budget submission. It is possible, that the RFA will, particularly during the early years of the road user charging system, be required to make section 20(4)(a) amount of funding determinations in respect of many more "economically efficient" projects and programmes than it is able to fund with the resources at its disposal (basically the revenue from road user charges). A further constraint is the "stability principle" under section 20(4)(b)(ii) of the Act which requires the RFA to avoid "*substantial increases in the rates of road user charges in any one year and, in the longer term, the maintenance of a reasonable stability, in real terms, in the rates of road user charges*".

The RFA's "amount of funding" determinations under section 20(4)(a) are characterised by the fact that they are: (a) not time bound, and (b) not influenced by the availability of funding. They are therefore "approvals in principle" that indicate that specific projects and programmes are eligible for funding in accordance with the economic efficiency and infrastructure safety provisions of the Act (subparagraphs (i) and (ii), respectively, of section 19(1)(a)). The implication is therefore that funding will be provided at some time in the future. If this were not the case the road sector would by definition not be "economically

[61] See paragraph 7 of the draft Rules and Principles on Traffic Law Enforcement and Adjudication.

[62] Such a master plan or an annual guideline amount determined in accordance with it should, however, not be used to prevent an approved authority or the Roads Authority from including any viable project or programme in a budget submission. The purpose of the guideline amount is to provide stability, reality and general economic efficiency to the budgeting and funding process in a longer-term context.

[63] During the Working Meeting held at Cape Town from 6 to 8 May 2004 the point was made that, in considering a project or programme, the RFA is not required to "redo" the feasibility study that the RA or an approved authority submits in support of such project or programme. The RFA is required to ensure the study provides a scientifically authentic motivation of the particular project or programme and that the provisions of the Act and the section 19(2) rules and principles are complied with. The RFA must then proceed to apply the principles of the Act to the matter.

efficient". This may be stated otherwise, namely that a failure to provide funding at the economically efficient level by definition implies that the road sector is less than "economically efficient", hence that there is some degree of "inefficiency". We will return later to further specific implications of approving projects and programmes, respectively, "in principle".

Before we finalise our discussion of section 20(4)(a), the question needs to be asked as to what happens when the application of the provisions of subparagraphs (i) and (ii) of section 19(1)(a) places irreconcilable demands on the RFA in the course of making its section 20(4)(a) determinations? As the text of section 19(1)(a) is currently structured, the "economic efficiency rule" (subparagraph (i)) and the "roads safety standards rule" (subparagraph (ii))[64] applies equally and simultaneously. This impression is reinforced by the word "and" that joins the two subparagraphs. The effect of such an approach (which is in line with the rule of legal interpretation that every word used in a law must be given full effect) is that a funding determination must not only be economically efficient, it must at all times comply to the fullest extent with the safety standards. If compliance with the safety standards requires funding at a higher level than the economically efficient level, there is a problem. If compliance with the economically efficient principle implies that the RFA cannot to the fullest extent comply with the safety standard, there is also a problem. Clearly, the correct remedy must be to amend the Act and to spell out which one will have preference. In general, the economic efficiency principle has always been emphasized and rightly so because the RFA acts as the trustee of the road user which is the only party paying road user charges. On the other hand, is it right that the RFA should be permitted to indirectly determine whether the Transport Minister's safety standards will be adhered to or not? It is clear that a policy decision must be made here and that section 19(1) should then rather be amended so as to clearly indicate how the two principles are to be given effect to.[65]

[64] According to section 20(4)(a)(ii) of the RFA Act, funding must be sufficient to enable the Roads Authority to comply with the road standards and measures prescribed by the Transport Minister under section 16(5) of the RA Act. It is submitted that that Minister is indeed the correct functionary by virtue of his/her interest in ensuring roads safety in Namibia.

[65] The policy issue raised in connection with the second issue above is whether the RFA should provide funding from the Road Fund (i.e. out of road user charges) even if the funding requirements to ensure compliance with the prescribed minimum roads standards and measures exceed the funding determined in accordance with economic efficiency criteria, i.e. mainly based on traffic volumes on the road concerned. There is a further policy issue related to this matter. In this regard we refer to policy decisions taken at the time when the RFA Act and RA Act were being drafted. Although the RFA Act, in its present form must be taken as point of departure for purposes of legal interpretation, we nevertheless believe that the earlier background is of relevance. Section 16(4) of the RA Act refers to roads which are constructed by the RA at the direction of the Minister responsible for transport and which shall be subject to funding from sources other than the Road Fund, if the RFA cannot, in terms of its legislation, provide all, or only part, of the necessary funding. The policy decision at the time was that the RFA should, after construction, be responsible for the maintenance of any road constructed under section 16(4) of the RA Act and that such maintenance funding would, if necessary be ensured by the provisions of section 19(1)(a)(ii) of the RFA Act read with section 16(5) of the RA Act. The latter provide for the prescribing of minimum standards and measures for the managing of the national road network. The implication was that the roads concerned would thus have to be maintained with funding provided by the RFA, i.e. implying that strict economic efficiency principles would be subservient to the "safety" requirements. It was, however, understood that the Minister would not be unreasonable (see the wording of section 16(5) of the RFA Act) in specifying standards and that such standards would take account of economic principles in as much as that standards would vary depending on the traffic on a road. A further policy consideration is that road safety and road traffic safety, or public safety in transport, is a so-called "pure" government responsibility vesting in the Minister responsible for transport. (The following statement is made in paragraph 2.28 in Chapter 2 of the White Paper on Transport Policy (see reference no. 4 in Annexure B): "The 'pure' government functions include such things as policy formulation, overall monitoring of sector developments, economic regulatory activities, and

In order to be able to finalise its budget, the RFA must make a second round of funding determinations. Section 20(4)(b) of the Act deals with these "manner of funding" determinations. Clearly, those "new" projects which the RFA cannot immediately fund because of the constraints mentioned earlier, must be postponed to be funded later, while in respect of "programmes" the RFA will either have to:

(a) allocate funding at a lower level than the economically efficient funding level (e.g. reduce the maintenance blading frequencies on gravel roads);

(b) completely "scrap" (i.e. no funding is allocated) a programme for a specific year (e.g. suspend road reserve clearing); or

(c) postpone a programme until a following year (e.g. re-gravelling of gravel roads).[66]

This raises an interesting point. "Projects" which are postponed are assumed to retain their "approval" under section 20(4)(a) of the Act and that they will be implemented at some time in the future.[67] However, when programmes which are not implemented (i.e. they are "scrapped", e.g. the clearing of road reserves is temporarily suspended until a following year or later depending on funding availability), or "scaled down" (e.g. road blading frequencies on gravel roads are reduced), it is not clear whether a section 20(4)(a) "approval" continues to exist (see the need for regulations in this regard which is referred to below).

To continue, now, with the discussion of the section 20(4)(a) and (b) determinations, we turn to the requirement in terms of paragraph (b) of section 20(4) that the RFA must determine the manner in which it will allocate the amount of funding it has determined under paragraph (a) of section 20(4) during the ensuing financial year and each of the four financial years thereafter. (I.e. the period covered by a forthcoming business plan.)

The problem created by paragraph (b) of section 20(4) is that its formulation appears to prohibit the RFA from postponing a project or programme, which it has approved under paragraph (a), for longer than five years or even to schedule funding so that only some of the approved amount is to be allocated during the five year period of a forthcoming business plan. Depending on how many projects are submitted by an approved authority which are approved in principle, "projects" may even have to be postponed for longer periods than the five year

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other regulatory activities related to safety, the environment, consumer protection, etc."). From this point of view road (infrastructure) safety and road traffic safety are the responsibilities of the Minister responsible for transport. (Cf. also the expenditure under section 17(1)(h) of the RFA Act which is determined by the relevant Minister in terms of section 15 of the National Road Safety Act, 1972.) We are therefore of the view that from a policy point of view compliance with minimum road safety standards, as long as such standards are not unreasonable taking traffic into account, is a mandatory obligation of the RFA superseding its "economic efficiency" mandate. However, we note that the present provisions of section 19(1)(a)(i) and (ii) of the RFA Act are not reconcilable in cases where the funding requirements in terms of section 19(1)(a)(ii) exceed those determined in accordance with section 19(1)(a)(i). In such a case the two requirements cannot be simultaneously satisfied.

[66] The Roads Authority currently budgets for re-gravelling under its "maintenance programme". Since a particular section of road will only be re-gravelled once every few years the expenditure should, strictly speaking, be seen as "project" expenditure.

[67] The assumption that a project approval, once given, does not need to be renewed should be qualified to the extent that if the project details or the relevant circumstances change over time a previous approval should be re-confirmed before implementation.

period of a forthcoming business plan.

A related problem is that any project which the RFA may have approved in principle, but which it is unable to fund at all during a forthcoming business plan period, will not be shown in its business plan and it may thus appear as if the RFA has "rejected" the relevant project, in other words that it represents a "*refusal of the Administration to make a determination referred to in paragraph (a)*", where this is in fact may not necessarily be the case. This is of relevance for the initiation of dispute adjudication proceedings as contemplated in section 20(7) of the Act, since prospective disputants will have no way of distinguishing whether a specific project has merely been postponed for more than five years or whether it has been rejected (assuming that postponement for more than five years is permissible or made permissible by way of an amendment to the Act).

The above problem would be eliminated if the last part of section 20(4)(b) of the Act is reworded as follows (insertions underlined):

> "*…the manner in which the amount of funding referred to in paragraph (a) is to be allocated in respect of the ensuing financial year and each of the four financial years following thereafter* <u>*or, if such funding is to be allocated partly or in whole during any subsequent years, the manner in which it will be so allocated.*</u>**"**

If the proposal to amend the Act as above is accepted it would imply that the format of the RFA's business plan should include the columns and details as shown in the table included as Annexure C to this Report.

In concluding our discussion of section 20(4) of the RFA Act we would like to touch on one other aspect of the "manner of funding" determinations to be made by the RFA under paragraph (b) of subsection 20(4). Subparagraphs (i) to (iv) of paragraph (b) spell out the considerations which the RFA must take into account in deciding how it should allocate any funding it has determined under paragraph 20(4)(a) during the period of a business plan and, if the amendments we propose are accepted, during any future years. Some questions not explicitly covered in the Act arise in this regard:

(a) If there is a shortage of funding in a particular year (section 20(4)(b)(i)), how should the RFA proceed in prioritising a limited amount of funding between not only different competing projects and programmes within the budget of any particular approved authority but also between different approved authorities (i.e. for the different expenditures contemplated under section 17(1)(a) to (g) of the Act)? In other words, should some approved authorities be allocated no funding at all or should all approved authorities receive at least some funding and, if so, which principles should be applied by the RFA in exercising its discretion to decide how far to cut back each approved authority's total allocation?

(b) How should a limited amount of funding be split between "programme" type expenditures and "project" type expenditures? It is assumed that if a "programme" is either scrapped (if that it possible) or the funding level is reduced below the optimum level (e.g. a gravel road is bladed less frequently than it should be in terms of economic efficiency principles) such an "under-funding" would not be carried forward to future years as an outstanding funding liability (but see a possible exception below in this regard) while that would not be the case for "project" funding, where non-funding in a

particular year would merely imply postponement of the project concerned (provided it has not already commenced). In other words, a "project" which has been approved in principle under paragraph 20(4)(a) will become a permanent funding liability of the RFA until it is eventually funded.[68]

(c) Can an approved authority, on the basis of the RFA's section 20(4)(a) determination, assume that either a project or programme should in fact be funded and on that basis implement the project or programme out of own pocket on the assumption that the RFA must eventually provide the necessary funding? This possibility can obviously only arise where a specific approved authority has own funding sources which it can use. It would seem that if this situation were to arise it would imply that the approved authority has "loaned" the money to the RFA with concomitant balance sheet implications for both parties.

The logical approach to the questions under (a) and (b) above would be to apply the basic "economic efficiency" approach of the Act. On a strictly theoretical basis, and provided the varying marginal values (for the road sector) of different expenditure levels on each funding responsibility of the RFA were available, a precise mathematical answer as to how limited funding should be allocated between different funding needs could be obtained.

In practice a variety of factors such as contractual obligations on certain funding priorities (RFA's contractual obligations (e.g. loans), road standards referred to in section 20(4)(a)(ii),[69] implementation capabilities, compliance with procedures, etc. make such an approach impractical. It would seem that the RFA must use its discretion and make its decisions in a rational manner. In this regard it is interesting to note that the RFA Act, while allowing that section 20(4)(a) "funding amount" determinations for management of the national road network (section 17(1)(a)) may be subjected to independent expert adjudication, does not permit the adjudicating panel to adjudicate the "manner of funding" determinations of the RFA.[70] In order to be able to justify its determinations the RFA must be able to show that it

[68] This would seem to further confirm the need for a different format for the RFA's financial statements which are required to "*reflect fairly the state of affairs and business of the Administration and the Fund and to explain the transactions and business of the Administration and the Fund*" (Section 24(1)(a). Any liability would be "that of the Fund" (in the sense of the transactions pertaining to the Fund as an account), one presumes, and not that of the Administration.

[69] An interesting question is whether the Act should actually provide guidance to the RFA in connection with the priorities that should be funded under section 20(4)(b) allocations. In a note the RFA made the following comment: "*The only consideration left is then one of prioritisation. As far as this is concerned, I believe that the requirement of economic efficiency would still hold, because economic efficiency is always relative and never absolute - it can always be strived for ("with a view to achieving"), but never be attained absolutely. Efficiency is by definition really measured in terms of wasted resources, and while resource wastage can always be reduced, it can never be eliminated completely. Therefore, even if resources are wasted, efficiency can still be strived for. In a situation, where the RFA is called upon to prioritise between conflicting demands, it would therefore be called upon to decide where to spend the Road Fund's resources to achieve the highest possible level of efficiency. Apart from that, some obviously reasonable prioritisation, which surely need not be entrenched in the Act, is that the RFA should in the first instance honour existing obligations; such as the servicing of debt, the continuation of funding for contractually committed projects and programmes, and co-funding commitments given to donor agencies and Government. In fact, the difficulty of the RFA in making some reasonable amount of funding available to traffic law enforcement is merely due to the fact that the RFA was already over-committed on the aforementioned existing obligations, to the extent that it had to borrow substantial sums of money just to meet these commitments.*"

[70] It seems that the Legislator intended that these determinations should be excluded from review by the expert panel as per section 20(7) precisely because the relevant expertise was seen to be present in the RFA rather than

has applied its mind in a rational manner. At most the Act could include a provision in section 20(4)(b) requiring the RFA to *"in making its manner of funding determinations in terms of the considerations mentioned in subparagraph (i) to (iv) of paragraph (b), promote as far as practicable the achievement of its object as set out in section 3 of the Act"*. Such a provision could, further, be stated to apply to both the way in which available funding is distributed between different approved authorities and between funding to be provided for projects and programmes (which may imply definitions of these two concepts). Finally, there could be a provision stating that no determination of the Administration under section 20(4)(a) or (b) shall be construed as binding the Administration to provide funding in any future period unless it has so agreed with any party.

5.6.3. Conclusions and recommendations

The separate and sequential determinations which the RFA must make under paragraph (a) and paragraph (b) of section 20(4) are the two important first steps in the sequential decision-making process mentioned in the definition of "road user charging system" in section 1 of the Act. They are fundamental to the way in which the road user charging system should operate and be managed since they bring about the separation between the RFA's "funding regulatory" function and its "funding provision function". Ultimately, of course, the RFA is supposed to manage the road user charging system in such a way that the amount of funding it determines under paragraph (a) of section 20(4) is equal to the amount it provides under paragraph (b) of that section. The difference between the paragraph (a) and paragraph (b) determinations (taking account of effects occasioned by revenue flows other than from road user charges, e.g. from loan disbursements), is a measure of the extent to which the road user charging system is being managed to ensure an economically efficient road sector.

The present provisions of paragraph (a) of subsection (4) of section 20 of the Act, namely:

> *"(4) The Administration shall, after evaluation of every budget submitted to it in terms of subsection (1) and after consultation with the Roads Authority and every approved authority concerned, and after evaluation of the Administration's own funding requirements -*
>
> *(a) determine, with due regard to the rules and principles contemplated in section 19(2) and the provisions of the procedures agreement contemplated in section 17 of the Roads Authority Act, the amount of funding to be made available in respect of every project or programme or administrative expenditure; "*

are adequate from the point of view of ensuring that the "optimum" amounts of funding for projects and programmes are determined.

However, the words "*and after evaluation of the Administration's own funding requirements*" should not appear in the leading sentence since it suggests that the RFA's own funding requirements are a first priority. Since a determination under paragraph (a) must be made without being influenced whether funds are available or not, these words should be removed and would more appropriately be included in section 20(4)(b). As regards the determination of funding priorities in general it is submitted that the economic efficiency principle is indeed

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the panel. In effect the RFA's exercise of its discretion can be challenged in a court of law where the expertise of an expert adjudicating panel may not necessarily be called upon.

the guiding principle in the allocation of funding. However, it must be pointed out that the Act already contains an indication of priorities. This is section 20(4)(b)(iv) that requires the RFA to consider the amount of funding required in respect of projects to be continued from any previous year. In order to be consistent, it could be argued that one should actually list all relevant priorities in the Act. There are also some other cases of expenses that must be paid that deserve mentioning such as section 17(1)(a) (the RA's administrative expenditure), (h) (road safety contributions), (i) (repayment of State loans in respect of roads), (j) (repayment of loans taken up by that RFA itself), (k) (establishment of a reserve fund), (l) (payment of compensation where the RA incurs civil liability), (m) (the cost of insurance), section 20(4)(a)(ii) (compliance with the road standards prescribed by the Minister responsible for transport), etc.

Further, the reference to *"the provisions of the procedures agreement contemplated in section 17 of the Roads Authority Act"* is not correct. The provisions of the relevant procedures agreement cannot play a role in how amounts of funding should be determined. Only the provisions of section 19 of the RFA Act should play a role. Both the above-mentioned phrases should therefore be deleted.

Finally, the reference to the section 19(2) rules and principles in section 20(4)(a) should be expanded so that the reference is to both subsection (1) and subsection (2) of section 19. This is necessary to ensure that the provisions of section 19(1) remains supreme and also to cater for the eventuality that the section 19(2) rules and principles may not yet have been framed and to avoid any perception that in the absence of section 19(2) rules and principles the RFA is not obliged to make a section 20(4)(a) funding determination in any given case.

The conclusions regarding the present provisions of paragraph (b) of subsection (4) of section 20 of the Act, namely that:

> *"(4) The Administration shall, after evaluation of every budget submitted to it in terms of subsection (1) and after consultation with the Roads Authority and every approved authority concerned, and after evaluation of the Administration's own funding requirements –*
>
> *(b) determine, with due regard to -*
>
> *(i) the funds as contemplated in section 16(1) estimated to be at the disposal of the Fund, including the reserve fund contemplated in section 17(1)(k);*
>
> *(ii) the avoidance of substantial increases in the rates of road user charges in any one year and, in the longer term, the maintenance of a reasonable stability, in real terms, in the rates of road user charges;*
>
> *(iii) any moneys accruing to the Roads Authority or the approved authority concerned from any source other than under this Act in connection with any project or programme or its administrative expenditure and, to the extent that it may affect the making of an allocation, the value of any assets, equipment,*

human resources and other relevant resources which are or will in all probability be at its disposal; and

(iv) the amount required to fund each project or programme referred to in subsection (2)(b),

the manner in which the amount of funding referred to in paragraph (a) is to be allocated in respect of the ensuing financial year and each of the four financial years following thereafter."

are that:

(a) the words "*the Administration's own funding requirements*" should be inserted above subparagraph (i) of paragraph (b) as a new subparagraph and the other subparagraphs be renumbered;[71] and

(b) the words "*or, if such funding is to be allocated partly or in whole during any subsequent years, the manner in which it will be so allocated*" should be appended to the closing sentence under paragraph (b).

One could consider a new definition in section 1 of the Act which defines the concepts "project" and "programme". Generally, a "programme" is regarded as an activity requiring expenditure of a recurring nature (e.g. road maintenance) while a "project" relates to expenditure on a new facility or the replacement of an existing facility that is intended to be completed within a single specified time period. Because programmes are usually "year specific", one should actually amend section 20(2)(b) which gives the impression that programmes can be continued from a previous year. On the other hand, it may be better to retain the present text because it may, in the case of recurrent annual work, be necessary for the RA to conclude contracts with other contractors that span more than one year. The funding of continuation commitments is therefore more complex that it may seem. In order to handle this and to avoid extensive amendments to the Act it is suggested that an empowering provision be inserted in the Act that enables the RFA to define "projects" and "programmes" and to frame the necessary rules in cases of continuation contracts and also what the implications of a section 20(4)(a) determination will be for future years (i.e. the continued validity of such a determination).

For purposes of being able to deal better with the fact that funding amount determinations under section 20(4)(a) in respect of "projects" differ from determinations in respect of "programmes" in as much as that "projects" may be postponed and retain their approved status while "programmes" must be re-submitted each year[72], additional appropriate provisions (in the form of a subsection) must be provided for in section 20 after subsection (4). These additional provisions should take account of the fact that an "approved" project which stands over, whilst retaining its approved status once obtained, will be subject to review if any part of the information upon which its approval was based has changed to the extent that it may affect the approval previously given.[73]

[71] If the RFA is in agreement with that all the priorities referred above should be reflected in the text.
[72] This is because they are "year specific" and cannot retain an approved status.
[73] It should be pointed out, however, that section 21(4) does permit the RFA to amend its business plan "in order to accommodate a change in circumstances or any new considerations". All unfinished projects and programmes

In order to avoid any perception or expectation that a determination of an amount of funding under paragraph (a) of section 20(4) creates a contractual obligation on the RFA to allocate funding to any approved authority or in respect of any project or programme which such approved authority may temporarily fund out of its own resources on the expectation that it will be able to subsequently call upon the RFA to reimburse, a suitable provision in section 20 should be considered.

In order to emphasize the role of the RFA in managing the road user charging system it is proposed that section 15(1) be amended so as to reflect the correct sequence of the system in respect of the RFA's functions.

Finally, the view herein is that the principles for prioritisation of funding during times of limited funding are implicit in the general economic efficiency principle spelt out in section 19 (1). However, the proposals included earlier can be considered if there are concerns in this regard.

We conclude by referring to a matter which was brought to our attention at a late stage and which we were not able to further investigate. This is whether the RFA's provision of funding in past years gives rise to a "legitimate expectation" on the part of the RA or approved authorities that the RFA will continue to provide similar levels of funding in future. In other words: must the RFA consider the allocations that it has made in the past when making its "manner of funding determinations"? According to the "legitimate expectation" doctrine, a public body can be expected to act consistently. The RFA's problem is that it does not have definite control about what will happen in respect of Fund income through road user charges in future years. However, there is no certainty as to whether the "legitimate expectation" doctrine applies to public authorities (e.g. local authorities).[74] We do not have final answers in this regard and, depending on guidance received from the Client, will further investigate this issue in the course of the next phase to this Project with a view to possible amendments to the RFA Act which will, if necessary, absolve the RFA from being bound by any of its past funding allocations.

5.7. Responsibility and powers of the RFA to ensure the efficient use of funds

5.7.1. The issue

The RFA has stated in its Guidance Document that the responsibility and powers of the RFA to ensure the efficient use of funds are extremely important to the RFA but that the provisions of the RFA Act appear to be weak in this regard. The Document requires the Consultants to "*analyse the RFA Act with regard to the powers the RFA has of performing audits, both financial and technical, and of imposing sanctions in the case of a party not complying with the conditions imposed with respect to funding from the Road Fund. Subject to the Consultants' findings and consultation with the RFA, the Consultants should then draft appropriate legislative instruments with the aim of providing the required powers to the*

will appear in each year's business plan. It is therefore possible to amend the original section 20(4)(a) determination in respect of such a project or programme.

[74] Prof G Erasmus during the Working Meeting of 6 –to 8 May 2004 in Cape Town,

RFA".[75]

Related to this is the need for the RFA to have powers to enable it to ensure compliance with the requirements which financial and donor agencies might have in regard to the administration of funds channelled through the Road Fund.[76]

5.7.2. Approach

The current legal provisions in both the RFA Act and RA Act are reviewed against the background of the RFA's above requirements. Thereafter the relevant policy issues are addressed. The current legislative measures should also be considered against a particular policy background - it is in fact representative of a specific policy with regard to the responsibilities of different parties. Therefore policy aspects must receive detailed attention before we consider amendments to the legislation.

For the purposes of considering these policy aspects, a good starting point would be to approach this issue in a broader "efficiency" context - the rationale for the Road Sector Reform. More specifically, efficiency principles should apply not only to approved authorities funded by the RFA, but also to the RFA itself. This broader context is necessary so that the proposals ultimately accepted do not create a perception that the RFA must be treated differently to other entities involved in the Namibian road sector.

5.7.3. Analysis of legal provisions in current legislation

5.7.3.1 RFA Act

Section 15(1)(e) of the RFA Act provides as follows:

> *"Subject to this Act, the functions of the Administration are-*
>
> *(e) to implement appropriate measures for the effective monitoring of compliance-*
>
> *(i) by the Roads Authority, with the provisions of a procedures agreement contemplated in section 17 of the Roads Authority Act; and*
>
> *(ii) by an approved authority, with the conditions on which funding has been provided to it under this Act.*"

The following conclusions are drawn about section 15(1)(e):

(a) The section does not explicitly state that the purpose of the above "function" of the RFA is to ensure the efficient use of funds. Such an interpretation may be made by reference to section 17(1)(a)(ii) of the RA Act (which refers to particulars necessary to assess "the efficient utilisation of funds"). However, this is not an acceptable way of confirming the purpose of section 15(1)(e) of the RFA Act. It also needs to be

[75] In an e-mail message dated 06/02/2004 Mr Seydack of the RFA expressed the view that the proceedings of the Presidential Commission of Enquiry had resulted in a strong public perception that the RA had not used moneys efficiently and that the RFA was a party to this because of its failure to exercise the necessary controls.
[76] See section 15(1)(h) of the Act.

remembered that in paragraph (ii), section 15(1)(e) deals with approved authorities other than the RA and that in that case, the reference to section 17 is not applicable. In reviewing the RFA Act a more explicit formulation of the text should be considered;

(b) it basically serves to limit the RFA's obligations to the mere implementation of *appropriate measures* for effectively *"monitoring whether the RA complies with its procedures agreement"*. Apart from the fact that the expression "appropriate measures" is extremely vague, the Act does not directly empower or impose an obligation on the RFA to institute remedial measures if its monitoring function reveals non-compliance;[77]

(c) it relies, in the case of the RA, on the provisions of a procedures agreement (see below) and in the case of other authorities, on the conditions imposed on funding. A current procedures agreement and funding conditions are therefore pre-requisites, and the RFA's role in assessing the efficient use of funding now merely becomes an indirect function; and

(d) the words "appropriate measures for the effective monitoring of compliance …" in section 15(1)(e) do not automatically provide the RFA with powers to audit nor with any ancillary powers.

Section 20(5) of the RFA Act states that:

> *"Any amount of funding due to the Roads Authority or any approved authority may be paid to it by the Administration in such instalments and subject to such conditions as the Administration may determine."*

Section 20(5) does provide the RFA with some capacity to stipulate measures to ensure the efficient use of funds e.g. by subjecting funding to the implementation of specified management systems,[78] compliance with quality standards, independent inspection, auditing, etc. Any dispute arising from any condition imposed by the RFA under section 20(5) would have to be settled in a court of law where the reasonableness of the RFA's proposed conditions, against the background of its statutory mandate and that of the RA, would serve as the basis for making a judgment. The RA can, of course, argue that the conditions are not reasonable (i.e. proportional) since they seek to reserve certain powers for the RFA that the latter do not have under the normal circumstances (i.e. the other provisions of the Act).[79] The RFA would have to prove that it has a responsibility to ensure efficient use of funding, that the conditions with which it requires compliance are reasonable and that, unless such conditions are imposed, a real risk exists that funding will not be effectively or efficiently utilised.

However, any conditions imposed under section 20(5) would tend to apply before disbursement of funds and it would at most be possible to apply pressure for compliance

[77] This may not necessarily mean that funds are being "inefficiently" used.

[78] However, if the RFA uses s. 20(5) to stipulate for the implementation of certain management systems, the RA can argue that the RFA is undermining the procedures agreement mechanism (see s. 17(1)(a)(ii) of the RA Act's reference to the efficient utilisation of funds).

[79] It may therefore be appropriate to re-write section 20(5) and list a number of examples of conditions, including conditions that afford the RFA powers to assess the efficient use of funds. It can still end with an open-ended provision.

where funding is made in instalments (i.e. by threatening to withhold further instalments). A problem is, however, that an entity such as the RA cannot effectively be sanctioned by the threat of withholding funds, since it is not a business undertaking as such with funds of its own. In any event, the withholding of funds for an economically viable project or programme would create as many problems for the RFA as for the RA. What is perhaps needed is a power for the temporary suspension of funding where, in the course of a financial year, there are serious grounds for suspecting that the RA is abusing funding or committing funds in an improper way, and that it is in the interests of the road sector to temporarily suspend funding to prevent this – all, of course, pending an investigation.

Our conclusions about section 20(5) are that -

(a) in the case of the RA, it provides the RFA with a possible alternative avenue and, in the case of the approved authorities, the only avenue, to ensure that adequate management systems and other measures such as the power to have access to books, records, documents, auditing, etc. for the efficient use of funds allocated by the RFA are implemented;

(b) any refusal by an approved authority to comply with conditions proposed by the RFA may complicate the funding process;

(c) non-compliance with the conditions under which funding is provided will not, specifically in the case of the RA, really empower the RFA to institute remedial measures, e.g. by withholding funding.

5.7.3.2 The RA Act

Section 17 of the RA Act provides for a procedures agreement to be entered into between the RA and RFA as follows:

"(1) Within two months after the transfer date, or such longer period as the Administration may determine, the Authority shall, in accordance with such procedures as the Administration may stipulate, submit to the Administration a draft procedures agreement containing such particulars as are necessary to enable the Administration to assess whether funds accruing to the Authority will be efficiently utilized by it for the performance of its functions, including –

(a) the management and financial systems to be implemented by the Authority, and measures to be introduced by it to ensure -

(i) compliance with the rules and principles contemplated in section 19(2) of the Road Fund Administration Act; and

(ii) the efficient utilisation of funds allocated to it in respect of projects and programmes included in the business plan referred to in section 21 of the Road Fund Administration Act;

(b) the principles to be applied in budgeting for administrative expenditure, including the cost of acquiring immovable property for administrative purposes;

(c) the procedures to be followed by the Authority in the calling for, and the evaluation and awarding of, tenders and in the negotiation of agreements with, any person, body or authority referred to in section 16(2); and

(d) any other matter relating to the performance of the Authority's functions under this Act which the Administration may require.

(2) The Administration shall approve a draft procedures agreement either without amendments or with such amendments as may be effected in consultation with the Authority."

In analysing the procedures agreement provisions in section 17 of the RA Act the following observations can he made:[80]

(a) It provides for a forward-looking "assessment" by the RFA on the basis of particulars to be provided by the RA. Moreover, it does not focus on a direct assessment of the RA's financial transactions but on the management procedures and principles which the RA should implement to make assessments possible. Section 17(1) can therefore only assist the RFA in so far as it compels the RA to divulge information that will assist the RFA in deciding whether the RA will *in future* handle funds efficiently;

(b) the type of particulars to be provided is prescribed by legislation and are limited in scope;

(c) it does not empower the RFA to unilaterally effect a change to any system or procedure proposed in the RA's draft procedures agreement - this can only be effected by insisting on a change and refusing to agree to the draft text without it;

(d) the finalisation of a procedures agreement is dependent on consultation and consensus between the parties - there is no specific provision for the resolution of disputes, nor has provision been made for a time-frame within which the agreement must be finalised. This deficiency seriously affects the value of the procedures agreement as a control mechanism;

(e) it is not really an "agreement" as such but, according to section 23 of the RA Act, the content of a procedures agreement can be the basis for a complaint and therefore compliance with the provisions of a procedures agreement can be enforced *via* section 23 of the RA Act;

(f) it confirms the policy that the Minister responsible for transport is responsible for the efficient performance of the RA; and

(g) the content and formulation of the provisions of a procedures agreement itself are of the utmost importance if it is to serve as the point of departure for a complaint in terms of section 23 of the RA Act aimed at ensuring efficient performance of the RA.

[80] Section 17(1) requires the RA to divulge such particulars as may be necessary to enable the RFA to assess whether funds are efficiently utilised by the RA on the basis as set out in the agreement. The operative word here ("assess") reminds one of a monitoring function and not something in stronger terms such as "ensure". Moreover, the RFA is not afforded direct access to the RA's books, etc. The RFA can merely base its perceptions on the information contained in the agreement. All that the RFA can then do is to exert pressure on the RA to adopt mechanisms and strategies that will ensure the efficient utilisation of funds (see section 17(2)).

The relevant provisions of section 23 of the RA Act read as follows:

> " *(1) Any person who is of the opinion that the Authority has failed to comply with any provision of this Act, or a performance statement or a procedures agreement, may lodge with the Minister a written complaint, which shall -*
>
> *(a) set out the grounds of the complaint;*
>
> *(4) After receipt of the Authority's reply in terms of subsection (3), and subject to subsection (5) the Minister may -*
>
> *(a) dismiss the complaint; or*
>
> *(b) if the Minister is satisfied that the Authority has failed to comply with the provision referred to in subsection (1), by written notice direct the Authority to comply with such provision within such period as may be determined and specified by the Minister in the notice.*
>
> *(5) Where the Minister considers it necessary or desirable for the purpose of making a decision in terms of subsection (4), the Minister may appoint a committee, on such terms and conditions as he or she may determine, to investigate the complaint, to hear any representations made by the complainant and the Authority and to report to the Minister.*
>
> *(6) The procedure for an investigation in terms of subsection (5) shall be as prescribed, and a committee referred to in that subsection shall, for the purpose of such investigation, have the prescribed powers with regard to the summoning and examination of witnesses and the production of books or objects.*"

The provisions of section 23 have the following implications:

(a) A complaint by the RFA will have to be based on a failure by the RA to follow any procedure or implement any system which it has indicated that it intends to follow or implement - which is why the "provisions" of a procedures agreement should be given careful attention. (These "provisions" should be interpreted as the "particulars" (see the opening sentence of section 17(1) on the content of a procedures agreement) of any systems, etc. that are contained in the procedures agreement and that effectively constitute answers to the requirements laid down in section 17(1).);

(b) the procedure for dealing with a complaint is in the hands of the Minister responsible for transport and, to a certain extent, in the hands of any committee that he/she may appoint under subsection 23(5) and depends also on the regulations promulgated under subsection 23(6);

(c) the regulations under subsection 23(6) (which do not yet exist) could provide an insight into the Minister's intentions with regard to complaints;

(d) the Transport Minister alone disposes of the power to direct the RA to comply with any provision with which it is found not to have complied - confirming that the

responsibility for the performance of the RA vests in that Minister. This is a very interesting consequence of section 23, because there are no other provisions in the Act that really suggest that a procedures agreement is enforceable in any way;

(e) section 23(6) of the RA Act does confer certain important powers on a complaints investigation committee constituted by the Minister under section 23(5) viz. to summon and examine witnesses and to produce books or documents (which makes it possible for an audit to be performed although not by the RFA), but it does not in so many words authorize the entry of premises, interrogation, investigation and seizure. It is submitted that to merely assume such powers under the present wording of section 23(6) would be too risky. Thus, it is proposed that section 23(6) should be amended to expressly provide for these powers;[81]

(f) since the powers to investigate complaints, including the power to make relevant regulations in respect thereof, vest in the Minister responsible for transport, the policy established by the legislation is, again, clearly that the ultimate responsibility for the efficient performance of the RA is that of the Minister responsible for transport. He/she also has the right to decide whether to decide to appoint an investigation committee or not;

(g) a possible vacuum is that section 23 does not provide for any powers on the Minister's part where he/she wishes to investigate matters himself/herself without appointing a committee; and

(h) it is submitted that section 23 should be amended to include a representative of the RFA on the investigation committee in cases where the utilisation of funding from the Road Fund are considered.

Finally, it must be pointed out that section 26(b) of the RA Act provides that the Transport Minister may make regulations concerning "the financial management and control of the affairs of the Authority". It is felt that this provision does, in principle, open a door.[82] It must be realised, however, that the matter is not in the hands of the RFA or the Finance Minister, and it must be recognised that, since that the RA is under the control of the Transport Minister, he/she would be less inclined to frame regulations that confer substantial powers of auditing, etc. on the RFA vis-à-vis the RA. The argument can also be advanced that the Act has in fact already provided a control instrument to the RFA in the form of the procedures agreement and that no further RFA involvement is sanctioned. However, one cannot escape the wide import of section 26(b). Moreover, "the financial management and control of the affairs of the Authority" is very relevant to our present issue.

[81] These powers will be subject the provisions of the Namibian Constitution. Since it must be evident that individual staff members may be criminally charged later in their own capacity on the basis of evidence acquired during an investigation under section 23(5) and (6), they will be entitled to the procedural fundamental rights such as the right to remain silent (Article 12(1)(f), etc. of the Constitution). Searches of persons must also comply with Article 13(2) that implies authorisation by means of a warrant.

[82] Although one would expect that regulations on the financial management of the RA would in the first place focus on the financial systems, and measures etc. that the RA should employ, it would not be irrelevant to create measures that provide remedies for cases where things go wrong in the course of a financial year, or at least when the RFA or any other interested party has a strong suspicion that things are going wrong. This is where provision for an expert body (whether the RFA, the Auditor-General or another institution or a panel) that is qualified to investigate the RA and to carry out a financial or technical audit, can indeed fill the void.

It needs to be remarked that there may be a real need to at least create a mechanism whereby the RA's affairs can be investigated in a speedy manner so as to identify any suspicion of mismanagement (including mismanagement that is not really connected to the procedures agreement). Surely, such a need may exist because, in the absence of the procedures agreement, there is really no way to take control of the RA's finances (except through an *ex post facto* audit under section 21 of the RA Act).

5.7.3.3 The SADC Protocol on Transport, Communications and Meteorology

Article 4.4 of the Protocol requires Member States, *inter alia* to:

> "*… establish autonomous accountable national roads authorities which are representative of the public and private sector and which have clearly defined responsibilities for –*
>
> *(a) overseeing, regulating and managing roads on a commercial basis by –*
>
> *(i) applying economic criteria in respect of the optimal scope, design and timing for road programmes; and*
>
> *(ii) implementing effective performance measurement and independent auditing;*
>
> *(b) effective utilization of funding for roads;*".

Since Namibia is party to the Protocol, it is obliged to comply with the provisions of the Protocol.[83]

The relevance of the Protocol to the issue under discussion is that it confirms (i) the concept of autonomy, (ii) the principle of effective performance measurement and independent auditing, and (iii) a responsibility for the effective utilisation of funding for roads.

5.7.3.4 Other legislation

Our investigation into legislation that provide for powers of inquiry and which may apply to the RA and the approved authorities revealed the following:

(a) The President may appoint a commission of inquiry in accordance with the Commissions Act, 1947 (Act No. 8 of 1947). This will constitute a very formal and time-consuming procedure which would not be appropriate in cases where speedy action should be taken.

(b) The provisions of the State Finance Act, 1991, (Act No. 31 of 1991), which *inter alia* deals with the functions of the Auditor-General. According to section 14, the Treasury may appoint internal auditors from amongst staff members "of the Ministry of Finance to carry out investigations at … *statutory institutions* in connection with any matter

[83] The Protocol was signed on 24 August 1996 and ratified by the Namibian Parliament on 30 July 1997. It was published on 4 November 1997 under Proclamation No. 24 of 1997.

relating to the functions of the Treasury and to determine whether the provisions of this Act or any instructions issued under section 24 have been or are being complied with."[84] These institutions include local authorities and possibly the RA in so far as it receives State funds in respect of its roads and related functions. Section 25(1) provides that the Auditor-General may audit the books of statutory institutions. In section 25(2), this power is extended to the auditing of any body other than a statutory institution. There is thus no doubt that the RFA can approach the Auditor-General to perform an audit in respect of the RA.[85]

(c) The State Owned Enterprises Bill 2004 will apply to the RA. Although the Bill does not provide for any specific powers of inspection in connection with State owned enterprises, it is assumed that the SOE Governance Council will act if an appropriate charge concerning alleged irregularities in a State owned enterprise is laid with the Council.

The conclusion with regard to the above is that they (especially the State Finance Act, 1991) could provide effective mechanisms for investigating the use of funding, although it must be remembered that the RFA will not be in charge of the relevant procedures. On the other hand, if the action is taken by another functionary, it will protect the RFA against allegations of being partial. In some cases the absence of specialist knowledge on the part of other functionaries about the functioning of the road user charging system may be an obstacle in their assessment of alleged financial irregularities on the part of the RA or relevant approved authorities.

5.7.4. Concluding observations about RFA and RA Acts

Our concluding observations are that:

(a) The legislation does not provide the RFA with an explicit mandate to ensure efficiency in the use of funding allocated to approved authorities;

(b) the legislation does not provide the RFA with sufficient powers to oblige the RA or any other party to implement adequate management systems and procedures to ensure the efficient use of funds;[86]

(c) there is, further, no mention, in the RFA Act or the RA Act, of any powers that will entitle a complaining party such as the RFA to enter the RA's premises, interrogate staff, search staff and offices, investigate and audit books and to seize books and other material

[84] A "statutory institution" is defined in section 1 of the State Finance Act, 1991, as "any board, body, fund account, company, corporation, organization or juristic person established by or under any law, controlling or being entitled to control by virtue of any such law, funds accruing to it as a whole or in part from moneys appropriated by Parliament for such purpose: Provided that a municipality and a village management board shall, for the purposes of Part III of this Act, be deemed to be statutory institutions;".

[85] Section 25(2) provides: "Whenever the President deems it necessary in the public interest, the President may require the Auditor-General to investigate, examine and audit in accordance with the provisions of this Act, the account books, accounts, registers or statements of any body, association or organization other than a statutory institution, as if such body, association or organization were a statutory institution."

[86] This is apart from steps that the RFA may take in terms of s. 20(5)'s conditions (RFA Act) and s. 23's complaints procedure and s. 26's regulations (RA Act).

relating to the RA's financial transactions.[87]

5.7.5. Policy aspects

For purposes of expediency this discussion will be confined to road funding, i.e. the roles of the RFA and the RA, rather than other approved authorities and their functions. It should be understood, however, that the basic policy applies equally to other functions and other approved authorities funded by the RFA[88].

It is submitted that the basic objective of the Road Sector Reform in Namibia is to ensure the "optimum utilization of scarce resources" in the Namibian road sector. Optimum utilisation (or efficiency) is one of the fundamental economic objectives of Government (see chapter 4 of the White Paper on Transport Policy). There can be no doubt that this basic objective, more specifically, the objectives intended to be achieved by the RFA Act and the RA Act, would to a large extent be negated if funds, generated through the road user charging system, are used "inefficiently" or if there are "irregularities" in the use of funds.

With the above as point of departure it is reasonable for the relevant legislation, the RFA Act and the RA Act (but noting that the latter would not apply to other approved authorities funded by the RFA), should make adequate provision to ensure that funding generated by the road user charging system is efficiently utilised. There is a further argument in favour of the above view, namely the fact that the RFA acts as the "trustee" of road user revenues, and therefore has a responsibility to road users to ensure that what they pay for road use is effectively used for the intended purpose.[89] It can be argued, however, that the RA has a similar responsibility. This view is reflected in the RA's draft Public Relations Policy where it is envisaged that the party with primary responsibility for roads expenditure, and thus the rates of road user charges, should be the RA (since it is responsible for managing the national road network) and that the RFA's role, on the other hand, is, firstly, that of independent funding regulator and secondly, because of the "user pay principle", that of provider of funding. In accordance with this approach the RA should be responsible for justifying

[87] Section 23(6) does confer certain important powers on a complaints investigation committee constituted by the Minister under section 23(5) viz. to summon and examine witnesses and to produce the production of books or documents.

[88] A question which arises is whether the RFA, in dealing with the functions contracted out to or assigned to the RA (see sections 15(1)(c) and 16(1)(f) of the RA Act, respectively), is dealing with the RA on the basis of the RA's main function as manager of the national roads as contemplated in section 16(1) or rather with the RA in the form of an "approved authority". This question *inter alia* arises because the RA's functions could be broadened under section 16(1)(f) and possibly also under section 15(1)(c), and include functions such as the operation of a traffic management system which would otherwise fall beyond the scope of the RA (see section 17(1)(d) of the RFA Act). A "consistent" approach may be to say that where an activity contemplated in paragraphs (c) to (n) of section 17(1) could either be carried out by the RA or by any other approved authority, that function should be funded in accordance with the provisions that pertain to that activity in those paragraphs. Funding should therefore not be connected to the RA's identity. It is suggested that the question whether the RA's procedures agreement apply to these "contracted" or assigned functions should also be determined in the same way. Evidently, the alternative approach would be to say that the "extension provision" in section 16(1)(f) of the RA Act makes it possible that matters which were non-core functions of the RA may now become core functions and should be dealt with as such. It is suggested that this is a policy issue on which the Client's guidance is required and which may which necessitate legislative amendments. From the RFA's point of view, the correct place where matters could be adjusted is section 17(1).

[89] During the development of the road user charging system one of the principles insisted upon by the road using community was that a dedicated road fund should be created as part of the road user charging system to ensure that revenues generated through road user charges could not be diverted to other uses.

expenditure (which equates to road user charges) while the RFA should be responsible to provide independent and expert confirmation that the RA's expenditure is optimal and that road user charges are imposed in an equitable way. The point of this is that the RFA's responsibilities with regard to the efficient use of funding, even its role as trustee of road user revenues, is no different from that of the RA. The question then follows as to why should the RFA then have a specific responsibility to ensure that the RA uses funding efficiently.

The end objective of both the RFA and RA is to achieve *a safe and economically efficient road sector*. The function of the RA is to manage the national road network while that of the RFA is to regulate road funding and raise revenue in accordance with the user pay principle (see definition of the road user charging system in section 1 of the RFA Act). Although the RFA Act and the RA Act therefore aim at the same end objective, a clear separation is made between the functions of the RFA and the RA. The intention of the Legislator was indisputably to separate the functions of "regulating" road funding and the operational function of "managing" the national road network and to establish each as an autonomous organisation. Confirmation of this is the fact that the RFA and RA fall under the administrative control of different Ministers. It is proposed that this policy principle be confirmed and that it should guide any review of the legislation.

The basic policy objectives to be achieved are therefore: (a) to ensure that both the RFA and RA (and all other approved authorities) make efficient use of funds, (b) to ensure clarity about the respective roles and responsibilities of the RFA and the RA (or the responsible Ministers), and (c) having established the roles of different parties, to make provision for the arrangements to be implemented and the procedures to be followed, including powers to act, in legislation.

In terms of the present legislation the performance of the RFA and the RA is ultimately that of their Ministers. The Ministers appoint the boards of directors. In the case of the RFA the Minister responsible for finance must consult with the Minister responsible for transport. This does tend to suggest that the Minister responsible for transport has a somewhat higher profile in the road sector. If the RFA is to be given more powers with regard to the efficient use of funds by the RA it would imply a substantial change in policy.[90]

5.7.6. The road funding and road management functions

With the above as policy background it is worthwhile examining the "regulatory" or road

[90] If legislative amendments are effected, they should, in our view, be restricted to such as would address the following weaknesses in the current legislation:

(a) The fact that section 15(1)(e) of the RFA Act does not provide the RFA with:
  (i) an explicit mandate to ensure that funds allocated to the RA and other approved authorities are efficiently used; and
  (ii) access to appropriate, but independent, procedures to be followed where it suspects that inefficient use of funding is occurring;

(b) the fact that section 20(5) of the RFA Act is not specific about steps which the RFA may or should take where there is non-compliance with any conditions imposed upon funding in terms of that section; and

(c) the lack of provisions in section 17 of the RA Act for:
  (i) the resolving of any disputes which may arise in finalising a draft procedures agreement;
  (ii) a time frame to finalise a procedures agreement; and

(d) possibly, the existence of a procedures agreement as a prerequisite for the finalisation of a business plan.

funding function and the road management function in order to understand the actual operational processes, on the basis thereof to identify the most appropriate requirements with regard to control over expenditure and, finally, to determine who should have what responsibility.

The RFA is obliged to evaluate individual road projects and programmes in terms of the costs and the benefits that the roads sector will derive from their implementation. At the operational level the RFA's responsibility is to ensure that it correctly evaluates the costs and benefits of individual projects and programmes submitted to it for funding. In order to do this the RFA must examine the data inputs (e.g. units costs for road construction, costs of vehicle operations, etc.) and the assumptions (e.g. future traffic growth, interest rates, etc.) used in motivating road projects and programmes.[91] The RFA's performance in achieving its mandate is in essence measured by its capacity to make correct evaluations of funding proposals submitted by the RA at the individual road programme and project level. To a large extent this depends on information supplied by the RA. The RFA's amount of funding determinations are made in accordance with previously accepted rules and principles in terms of section 19(2) of the RFA Act, are based on quantitative data and motivated assumptions, are transparent and subject to dispute and independent expert adjudication. The above are, however, not the main forces ensuring that the RFA's determinations are "economically efficient". Healthy pressures, exerted, on the one hand, by approved authorities requiring funding and, on the other hand, by stakeholders resistant to increases in the level of expenditure which directly impacts on the rates of road user charges, probably provide the necessary environment obliging the RFA to take correct funding decisions.

What the above implies is that the RFA's main responsibility regarding the efficient use of funds is to ensure that its "amount of funding" decisions are correct. If this is correct, the viewpoint can be put forward that the RFA should not have a particular responsibility to overlook the performance of the RA since it is clearly in the first instance the job of the Minister responsible for the RA to do so. By suggesting that the RFA should have powers in this regard one would in effect be arguing that the RFA has a responsibility to see that the Minister responsible for transport is doing his/her job properly.[92] This is a tall order and at this point in time something to be handled very sensitively. The initiative for the Road Sector Reform, after all, came from the Minister responsible for transport. One would have to argue that the RFA is in some or other unique position to do the job and, importantly, define this role in relation to its own Minister's responsibilities with regard to financial matters.

As far as the RA is concerned the basic mechanism to ensure the efficient use of allocated funds is that road building and maintenance contracts must be awarded to outside contractors under competitive bidding conditions (the procedures for which are part of the particulars in a procedures agreement). Subsequently the work of contractors is subject to certification by supervisory consulting engineers and the staff of the RA itself (also part of a procedures agreement). Further, all construction and maintenance work is executed in accordance with designs and specifications, prepared by registered professional engineers, forming part of the contract documents. Contracts are, or should only be, awarded by the RA if (a) the relevant contracts are for projects or programmes included in a business plan of the RFA, and (b) the

[91] See paragraph 5(5) of Part I of the Rules and Principles in terms of section 19(2) of the RFA Act.

[92] A counter argument would be there is merely a loose kind of independent control relationship between the respective Ministers and the RA/RFA, which enjoy a large measure of autonomy as expert bodies, and that the Transport Minister does not really supervise the activities of the RA.

contract amounts are in conformity with the amounts approved in the business plan. These are typical of the conditions which can be imposed on funding in terms of section 20(5) of the RFA Act. After the award of contracts the efficient use of funds should be ensured by appropriate on site quality control and certification of invoices.

What the above suggests is that the operational requirements to ensure an efficient use of funds are (where there are relevant existing legal provisions they are given in brackets):

(a) A critical assessment by the RFA of the particulars in a draft procedures agreement and acceptance of a comprehensive, well-formulated procedures agreement which should then result in the implementation of adequate management systems to monitor whether consultants and contractors are appointed under fair and transparent conditions and that funds are being efficiently utilised (sections 17(1)(a)(ii) and 17(1)(b) of the RA Act);

(b) compliance by the RA with the rules and principles under section 19(2) of the RFA Act in submitting projects and programmes for funding (section 20(2) of the RFA Act);

(c) competent evaluation by the RFA of projects and programmes submitted to it for funding (section 20(4)(a) of the RFA Act), including verification of data and assumptions;

(d) fairness and transparency in appointing consultants and awarding contracts (as per procedures agreement);

(e) adequate quality and financial control during the execution of projects and programmes (as per the procedures agreement);

(f) the availability of suitably competent staff to perform the above functions;[93] and

(g) suitable arrangements and powers to ensure remedial action where necessary.

The above suggests that the critical areas where control should be exercised (assuming that the functions performed by the RFA are excluded) is in the appointment of consultants, in the award of contracts and in the supervision of work and certification of invoices.

The policy established by the current provisions of section 17 of the RA Act only requires the RFA to "assess" whether funds will be efficiently used by the RA through the procedures agreement and to "monitor" whether there is compliance with the provisions of a procedures agreement. In the case of other approved authorities the RFA also only monitors compliance with the conditions upon which funding have been provided.

In order to give the RFA a much stronger role it has been suggested that the RFA should be given powers to:

(a) oblige the RA and the approved authorities to implement management systems regarded as necessary by the RFA;

[93] See section 18(1)(d) of the RA Act.

(b) either conduct audits or cause audits (technical and financial) to be conducted of the RA and other approved authorities, especially in circumstances that require speedy action; and

(c) oblige the RA and other approved authorities to implement remedial measures where such measures are necessary.

The above would represent a drastic change in policy and is likely to be controversial. Recent developments, such as the attempt by the RFA to undertake a forensic audit of the RA, the fact that the RFA was obliged to abandon the proposed audit and the establishment of the subsequent Presidential Commission of Enquiry into the RA and RFA, suggest that the matter should be handled sensitively.

If the RFA were to be given powers as mentioned above it would in effect imply that the RFA assumes responsibility for a function which was previously that of the relevant Minister, namely the Minister responsible for transport. It is in our view very probable, if the above Minister (on advice from the RA) were to oppose amendments as above, that the amendments could be blocked at the political level.

To summarise: It is submitted that the central issue is whether the control of funds should vest in the RFA or the Transport Minister. In favour of the RFA it could be argued that, since it has a "trusteeship" function in respect of moneys which it collects from road users, it should not only be able to monitor the utilisation of funds, but also to audit it at any given moment. This role of the RFA is alluded to in section 15(1)(e) of the RFA Act [94] and section 17(1)(a)(ii) of the RA Act. [95] However, nowhere in the legislation is the RFA given any direct powers to audit the RA. In favour of the Transport Minister it must be argued that he/she is the relevant line Minister, and that Article 40(a) of the Constitution suggests that the relevant Minister must supervise the bodies under his/her control. As pointed out above, section 26(b) of the RA Act even authorises him/her to make regulations concerning the "financial management and control of the affairs of the Authority". One should also remember that the Transport Minister is the highest political functionary responsible for the roads network of Namibia. It may constitute interference in his/her sphere of authority if the RFA were to be empowered to enter upon RA premises, seize documentation and perform audits.

It is submitted that a balanced approach should be pursued in solving the present issue. Recognition must be given to the RFA's ability to detect irregularities in the utilisation of funding, both by virtue of the expert knowledge that the RFA possesses as financial manager of the Road User Charging System and of its monitoring of the RA through the procedures agreement. On the other hand, the Minister's position must be respected.

A workable solution would be to provide the RFA with expedient access to procedures whereby financial and technical audits can be referred to suitable functionaries with expertise for such tasks. However, the involvement of the Transport Minister is necessary and a procedure must be created whereby that Minister could be approached to authorise an urgent audit of the RA's books through the RFA or an independent panel or the Auditor-General.

[94] More particularly in the words "the effective monitoring of compliance …".
[95] More particularly the words "efficient utilization of funds allocated to it …". We must add the fact that the procedures agreement seems to be enforceable *via* section 23 complaints, and that the RFA can act as complainant.

For this purpose, regulations made by the Transport Minister in terms of section 28(e) of the RA Act may be the utilised. The RFA should also be given the power to recommend remedial measures that the Minister could enforce.

It is submitted that the other alternative, viz. to reserve the power of auditing in a condition imposed under section 20(5) of the RFA Act, must also be viewed from this perspective (i.e. that the RFA should not act unilaterally without the co-operation of the Transport Minister). It has also been mentioned that section 15(1)(e)(i) of the RFA Act as read with section 17(1)(a)(ii) of the RA Act creates the impression that the RFA should actually exercise its monitoring function in respect of the RA through the procedures agreement. In the case of other approved authorities, it would be far easier to make out a case for directly auditing the beneficiaries of funding by virtue of a section 20(5) condition. It would, however, be useful to amend section 20(5) so as to spell out clearly that the type of conditions that may be imposed under that section may include the auditing or other procedures for ensuring the utilisation of funding by the beneficiary.[96]

In cases where there are indications that the Transport Minister will not sanction any steps against the RA, the most appropriate alternative route would be for the RFA to approach the Auditor-General under section 25. An alternative functionary could be created by using a dispute panel appointed under section 20(7) of the RFA Act, which will necessitate the extension of the powers of these panels through a legislative change.

Suitable amendments to the legislation will be prepared for the Client upon receiving advices as to which option/s is considered appropriate.[97]

5.7.7. The Cape Town Working Meeting

The following points (which do overlap to some extent with the preceding discussion) were made at the Cape Town Working Meeting held from 6 to 8 May 2004:

(a) The RFA is the one institution that has the necessary expertise about and knowledge of the RA's affairs to detect irregularities or the inefficient use of funds at an early stage.

(b) The public expects from the RFA to be able to ensure that funds are efficiently managed by beneficiaries. The basic principle is that monitoring should be effective. However, all measures taken in cases of suspected mismanagement of funds should be proportional to the seriousness of each case.

(c) It is probably not necessarily required that the RFA must be able to audit beneficiaries in their offices but rather that a beneficiary must be compelled to disclose relevant information about financial transactions and to afford the RFA insight into such data. Some control measures must be built in by beneficiaries, and in the case of the control of funding provided to the RA, this needs obviously to be effected through its procedures agreement as well.

[96] Where an approved authority receives funding subject to the right of auditing, it must also agree to permitting entry of its premises, the interrogation of staff and the search for and seizure of relevant documents.

[97] It must be noted that amendments to the RFA Act and RA Act in line with the proposals above may imply amendments to section 23 of the RA Act as discussed above.

(d) It should be possible for the RFA to carry out technical inspections at the sites where physical work and operations are being carried out by beneficiaries in connection with funded projects and programmes.

(e) In urgent circumstances, the Auditor-General should be able to carry out *ad hoc* audits of a beneficiary's books.

(f) Procedures agreement: The problem with section 15(1)(c)(i) of the RFA Act is that the powers of the RFA cannot only be made dependent on the existence or not of a current procedures agreement of the RA (see section 17 of the RA Act). Some or other obligation must be created in the latter section to compel the RFA and RA to bring a new draft procedures agreement to finality. The problem with the current provisions of section 17 is that the procedures agreement mechanism can only work when there is consensus between the parties and then there is no basis for the RFA to make an assessment of the RA's financial matters. At this stage, the RA and RFA are still in the process of developing procedures and principles for a proper working relationship. It is perhaps too early to expect the parties to have come up with a comprehensive consensus at this stage.

(g) Until such time as the RA Act can be amended to take care of these problems, the situation should be addressed through the negotiation of a procedures agreement containing the aggregate of consensus that has already been reached between the parties. Thus, even though a procedures agreement does not address all the aspects listed in section 17(1) of the RA Act, it would be better to operate on the basis of a "partial" procedures agreement rather than to have none at all.

(h) It would be ideal to amend the Act to empower either the RFA or the Minister of Finance to end a deadlock position between the RFA and the RA, especially in cases where measures against abuse of funds are expected. It is also proposed that the provisions of section 19(2) should be extended to provide the RFA with the opportunity to prescribe rules and principles on the efficient use of funds by approved authorities and, in the case of the RA, also where a particular aspect is not comprehensively covered by the procedures agreement.

(i) A particular shortcoming of section 15(1)(c) of the RFA Act and the procedures agreement provisions in section 17(1) of the RA Act, is that it appears to merely empower the RFA to demand information about the systems that the RA intends to implement. It does not afford any direct powers to demand information about financial transactions as such.

(j) Apart from taking action on the basis of the procedures agreement, what measures could the RFA take to ensure efficient use of funds? The following should be considered:

    (i) As regards the remedies that the RFA may enforce where misuse of funds are expected, it is evident that the RFA cannot merely terminate the funding of the RA as that would have disastrous consequences for the road user charging system.

(ii) When there are strong grounds for suspecting an abuse, the RFA must bring the problems to light. The best procedure would be for the RFA to communicate problems to the RA in accordance with a standing procedure or, in more serious cases, to report suspicions directly to the Minister of Finance or the Auditor-General. In this way, transparency is promoted and timely action can be taken. It is felt that transparency is of the utmost importance and it is even necessary that measures should be devised that prevent undue interference of political functionaries with the road user charging system.

(iii) Ideally, no funds should be transferred to the RA or other approved authorities until such time as, in the case of the RA, the procedures agreement is in place, and, in the case of the other authorities, the RFA can be convinced that they will comply with the conditions of payment that the RFA may wish to attach to payments under section 20(5). (In these cases the RFA would actually have to give the authorities an advance indication of conditions – i.e. before the payments are actually made.)

5.8. Sections 4 and 14: Appointment of the Board of Directors and the Chief Executive Officer

5.8.1. The issue

Firstly, the RFA is concerned that sections 4 and 14 of the Act may not be in line with the true intention of the Act. These sections provide for the roles of the Board of Directors ("Board") and the Chief Executive Officer ("CEO"), respectively.[98] The RFA's position is that, since Board directors are not employed by the RFA (although they do receive allowances), they are *de facto* non-executive directors.[99] The RFA therefore understands the intention of the Act to be that the Board, consisting of *de facto* non-executive directors, should be responsible for ensuring proper governance, which can most impartially and independently be done by not involving itself in the management of the organisation.[100] With this in mind, the consultants are required to consider whether the intentions of the Act were that the directors should in fact be regarded as executive directors, despite them not being involved in the day-to-day management. However, if that is the case, the question is how the Board directors should perform an independent governance[101] function, i.e. critically assess the performance of management, if they themselves are involved in the management function.

The RFA also notes that, according to dictionary definitions, the terms "management" (section 4(1)) and "administration" (section 14(2)) which are used in connection with the

[98] See paragraph 3.4.9 to 3.4.14 of the Guidance Document.

[99] The RFA commented as follows: "The way we saw it is that, not being employed by the RFA, makes directors non-executive as a matter of fact. Keep in mind that the very King Commission found that the law doesn't differentiate between "executive" and "non-executive", but that the difference is a matter of actual function performed. A director who is not involved in the day-to-day management of a company is regarded as "non-executive", and can therefore be regarded as having a special credibility regarding governance, as he/she can impartially assess the performance of a company's management, not being involved in, and possibly implicated by, management performance."

[100] Reference is also made to the King Reports on Corporate Governance.

[101] "Governance" is generally understood as a reference to the exercising of control over an organisation (Webster's Dictionary) – the power to manage the management.

functions of the Board and the CEO, respectively, could be used interchangeably and that this may create confusion

Secondly, the Consultants are required to advise whether the word "Administration" should not be replaced by the word "Board" in section 14(1). According to this provision, the "Administration" appoints the CEO. The RFA feels that the Act does not create the impression that "Administration" and "Board" are "interchangeable wording for the same entity". Thus, the Consultants should consider whether section 14(1) should not be amended to clearly say that (1) the appointment of the CEO is to be made by the "Board" but (2) that the CEO is in fact employed by the "Administration" (and not the Board) to put matters beyond all doubt.

5.8.2. Discussion

5.8.2.1 Board of Directors/CEO

Sections 4(1) and 14(2) provide as follows:

> *"4. (1) There shall be a board of directors of the Administration which shall, subject to this Act, be responsible for the policy, control and management of the Administration.*
>
> *14. (2) The chief executive officer shall be responsible for the administration of the affairs of the Administration in accordance with the policies and directions of the board."*

Non-executive directors are generally understood to be directors who are (a) not involved in the day to day management and (b) do not receive any benefits from the company/legal body on a standing basis other than their fee. It needs to be remarked in general that the Act does not provide whether the directors may or may not be employed by the RFA. It follows that there is nothing that bars the CEO and other employee from holding a directorship. But what exactly does the language of sections 4(1) and 14(2) disclose about the functions of the Board on the one hand, and the CEO, on the other hand?[102]

It is submitted that the words "policy" and "control" in section 4(1) confirm the "governance" function of the Board. As regards the word "management", it must be conceded that standard dictionaries do not clearly discern between "manage" and "administer", and use both as a means to define the other. It is also conceded that, as the RFA remarks, the word "administration" is generally more often found in the context of governmental bodies. However, it is a basic rule of statutory interpretation that every word must be accorded an effective meaning. This means that the use of different words in connection with similar matters (e.g. functions) are usually intended to have different meanings in the context of the Act. Evidently, we cannot ascribe an effective meaning to "manage" in section 4(1), on the one hand, and to "administer" in section 14(2) on the other hand, if they mean exactly the same. It is not possible that the Legislator could have intended that both the Board and the CEO should "manage" the RFA simultaneously or "administer" the RFA simultaneously. [103]

[102] It must be pointed out that the structure of Part II of the Act that sets out the qualifications, appointment, functions, etc. of the RFA, is in line with the usual statutory language used in other similar legislation on agencies of Government in Namibia.

If we apply this reasoning, it must follow that in order to accord an effective role to the Board and the CEO, one should seek for different meanings despite the interchangeability in dictionary definitions. This may lead to a construction that the Board is, in addition to its governance function, the operational manager of the RFA (hence the word "management" in section 4(1)), whilst the CEO is responsible for the execution of the decisions of the Board and the smooth running of the RFA as an organisation (hence the word "administration" in section 14(2)). On the other hand, if the CEO is also a director, the question arises whether it would be untenable for him/her to fulfil governance, managerial and administrative (secretariat type) functions.

The Consultants feel that a proper reconsideration of the functions of the RFA's Board and its CEO should not be attempted within the confines of this Review. We consider that such study would entail a proper analysis of the King Reports (and possibly, the SA Department of Public Enterprises' "Protocol on Corporate Governance" (2002)), and an innovative application of the principles of corporate governance within the context of the RFA being a governmental organ functioning as a regulatory authority. Moreover, the new State Owned Enterprises Council and Agency would probably demand that they should be consulted about the matter as well, especially where any legislative changes are contemplated.

Without entering the field that we consider reserved for a focused study, it is submitted that the following arguments are worthy of consideration:

(a) The Act is quite rigid in the sense that it spells out the RFA's objective and then continues to draw quite a narrow circle around the manner in which the organisation is supposed to carry on its functions. It is not similar to the Board of a business enterprise of the State that wishes to accommodate a wide range of the prevailing views held by society, etc. The RFA has little choice but to apply the expert knowledge of persons with thorough knowledge of the field in which the RFA operates (transport economics, accountancy, finances, engineering, etc.). If one looks at the expert decisions that need to be made (e.g. determination of the amount that is necessary to fund the expenditure for each financial year, the imposition and adjustment of fuel and other levies and fees, the determination of the economic efficiency of multimillion projects/programmes, the determination of the way in which the Fund should be managed so that each project/program is properly funded), it could be averred that these decisions cannot be taken by the CEO alone. Read as a whole, the Act may give the impression that the Legislator wanted to establish a compact and focused expert body to manage the financing of Namibia's roads. Of course, they would not be able to do so with a CEO who is not also familiar with the field. But if the Act intended the CEO to undertake all substantial managerial functions, it would certainly have made sense to confer original powers on the CEO throughout the Act. This argument could point us in the direction of a Board that was intended to be a pro-active "Board of trustees" type functionary and never intended to leave the operational decisions to the CEO. However, the question could be raised whether it would not be better to appoint such expert persons as employees of the RFA. This would indeed be an option, but then one should also consider whether the extent of managerial decisions that the RFA needs to make in

[103] It is submitted that not too much weight should be attached to the words "in accordance with the policies and directions of the board" in section 14(2). Every CEO acts in accordance with the policies and directives of his/her board. This is neither a conclusive indication of a non-executive Board nor of an executive Board - both types of boards formulate policies and issue directions (the "governance function").

terms of adjustment of levies, determinations of funding, etc. does justify the full-time employment of three to five experts. Would it rather be more cost effective to appoint three to five directors with specialist knowledge to act as a specialist statutory body to make these managerial decisions from time to time and strengthen their hand with a secretariat that executes its decisions?

(b) There is a growing tendency to apply principles developed by the King Reports to the public sector. However, even the innovative "Protocol on Corporate Governance" does not bind South African public sector bodies (similar to the RFA) that are not business enterprises. It follows that one should be careful in transplanting the business sector's approach to the management of public sector regulatory bodies, especially a body that shows strong signs of being designed as an expert, regulatory body which needs a staff to provide it with a secretariat function. However, the risk of bad management could arise. The question then again arises: who will perform an independent and impartial assessment of management performance if the Board itself is the manager? External auditors cannot do this as part of the annual audit of the organisation's financial statements. In the first instance, they only assume responsibility "to report on the fair presentation of the financial statements". Secondly, they require the Board to make a statement to the effect that it assumes responsibility for the system of internal control, etc., which are exactly what the governance function is about. It is felt that the need for, and possible scope of, the governance function should be carefully analysed and, that one should also, in this context, consider the future role of the new State Owned Enterprises Council and Agency.

5.8.2.2 References to the "Administration" and the "Board" (section 14(1))

Section 14(1) provides as follows:

> *"14. (1) The Administration, in consultation with the Minister and the Minister responsible for Transport, shall appoint a person who has expertise relevant to the functions of the Administration as chief executive officer of the Administration.*"

Other than a natural person, a legal person (entity) cannot act on its own. It acts through its organs. In the case of the RFA, these are the Board of Directors and the CEO. A reference to any power to be exercised by a legal person is therefore to be construed as a reference to the appropriate organ responsible for exercising that power. This conforms to standard usage of terminology in other similar Namibian legislation. A reference to a legal act to be performed by a particular organ of a legal entity (e.g. its Board of Directors, CEO, etc.) is therefore only necessary if some special reason exists.

In the light of what has been said, the reference in section 14(1) to the power of the "Administration" to appoint the CEO, can only be construed as a reference to the Board acting on behalf of the RFA (obviously the CEO cannot appoint himself/herself). Since the RFA as an organisation is the legal person, the CEO can only be the employee of the RFA, not of the Board.

5.8.3. Recommendation

It is recommended that –

(a) no amendments be considered on sections 4(1) and 14(2) until such time as a proper separate study has been undertaken in connection with the exact scope of the CEO and Board's functions in regard to the governance, management and administration of the RFA (see paragraph 5.7.2(a));

(b) such a study should address in particular the problem how to reconcile the need for an "expert" or professional" style board of directors which is able to provide strong guidance with regard to technical matters - as this is what the Act seems to imply - and which it may be argued is necessary in view of the unique function of the RFA, on the one hand, and, on the other hand, the need to preserve the board's image of "impartiality" in regulating road funding and acting as trustee of the moneys collected a road user charges from road users; and

(c) section 14(1) not be amended but, if there is a need to spell out in so many words which powers are vested in which organ, proper statutory amendments be considered as part of the said study.

5.9. Section 18: Use of fuels other than diesel and petrol

5.9.1. The issue

The RFA has, in an e-mail correspondence, brought an article which recently appeared in the Namibian newspaper to the attention of the Consultants. In terms of this article a local entrepreneur was developing for commercial use a system in terms of which motor vehicles can be propelled by means of fuel gas. Section 18 of the RFA Act dealing with the determination of road user charges, in subsection (1)(d) thereof provides for a levy only on petrol and diesel sold in Namibia. Should other means of energy be used to propel vehicles, the operators of such vehicles would receive the benefit of the road but would not be subject to a road user charge payable on the energy used to propel the vehicle in question. At the time of the drafting of the RFA legislation alternative sources of energy (apart from petrol and diesel) to be used for propelling vehicles were not in use in Namibia and this scenario was thus not covered. In view of developing technologies in this field (not only gas but also other sources of energy are investigated such as solar energy and electricity) it is necessary to review the RFA Act and propose legislative changes that would be forward-looking and sufficiently flexible to cover other types of energy sources used.

5.9.2. Approach

The current legal provisions in the RFA Act are reviewed against the background of the RFA's concerns stated above taking into consideration the underlying policies in this regard. We regard this as mainly a legal issue since the policies regarding the "user pay" principle have been sufficiently laid down before and must be given effect to by means of legislative amendments.

5.9.3. Analysis of legal provisions in current legislation

5.9.3.1 RFA Act

The relevant part of section 18 of the RFA Act provides that:

"18. (1) Subject to section 19, the Administration may from time to time after consultation with the Minister and such parties as the Minister may direct, by notice in the Gazette, and in accordance with such principles as may be prescribed, impose any one or more of the following road user charges for the achievement of the objects of this Act, namely:

(d) subject to subsection (4)(f), a levy on every litre of petrol and every litre of diesel sold by any undertaking at any point in Namibia and which is to be included in any determination of the selling price of petrol or diesel, as the case may be, under any law relating to petroleum products.

(2) Subject to subsection (3), the Administration may, in a notice under subsection (1), impose any road user charge at different rates in respect of different classes of motor vehicles, different roads, different categories of road-users or any other basis of differentiation as the Administration may determine.

(3) In determining the rates of road user charges under subsection (1), the Administration shall ensure -

(a) the raising of adequate revenue for the Fund to cover the amount of funding required as determined under section 20(4), taking into account moneys accruing to the Fund, the Roads Authority and any approved authority by virtue of all appropriation by Parliament or a donation or a grant by any person, body or authority;

(b) to the extent practicable, that the rates and combinations of such charges affecting different classes of motor vehicles are equitable in relation to their use of the road network and the benefits derived from such use;

(c) to the extent practicable, that the rates and combinations of such charges shall promote efficiency in the use of resources, including roads, motor vehicles and fuels; and

(d) that in respect of the rates and combinations of such charges there shall be no discrimination between local and foreign road-users.

(4) A notice referred to in subsection (1) shall state -

(a) the amount or rate of the road user charge imposed;

(b) the times when and the manner in which the road user charge shall be paid;

(c) the person who shall be liable for the payment of the road user charge;

(d) the person who shall be responsible for the collection of the road user charge;

(e) the penalty payable in the event of the late payment of the road user charge;

(f) subject to subsection (5), the circumstances and the manner in which exemption from the payment of any road user charge imposed under subsection (1)(d) may be granted, or a refund of an amount paid in respect of such charge may be made in respect of fuel sold for purposes other than on-road use;

(g) the measures to be applied where any person who is liable to pay the road user charge refuses or fails to pay that charge, including the creation of an offence punishable by way of a fine not exceeding N$ 4 000 or imprisonment for a period not exceeding one year or both such fine and such imprisonment; and

(h) any other provision which the Administration may consider necessary for the efficient administration of the imposition, payment or collection of the road user charge or the efficient application of this subsection.

(7) In the absence of an appropriate instrument or means for measuring the travelling distance of a motor vehicle for the purpose of calculation of the amount payable in respect of any road user charge, where applicable, the Administration may apply, in respect of any class of vehicle, any method which the Administration considers to be practical and fair for determining that distance."

It is clear from the above that the current provisions in the RFA Act cannot be used to impose a levy on an energy source other than petrol and diesel. We are of the opinion that, apart from section 18(1)(d), the remainder of the provisions appearing in section 18(1) are adequate to enable the RFA to impose one or more road user charges (e.g. a charge based on the travelling distance of a vehicle, under paragraph (a), or even a fixed annual charge, under paragraph (c)) which will enable equitable and adequate cost recovery from individual vehicles using non-conventional energy sources (i.e. without necessarily imposing a levy on fuel consumption as such). Such vehicles will therefore not be charged on the basis of their "energy consumption", which is in any event merely a "proxy" for road use. We note that petrol and diesel consumption are particularly convenient means of collecting the relevant road "consumption" user charge but that road user charging instruments based on fuel consumption are theoretically less pure in their application than charges based on travelling distance. Nevertheless, it can be argued that section 18(1)(d) should "as a matter of principle" be amended to broaden the scope of energy sources to which it applies. However, it must be accepted that there are likely to be various practical difficulties as previously indicated. As a general rule the Act should not only target the energy source (the input measurement thereof) as an instrument which can be levied but the measurement of output (i.e. distance travelled). The Act already provides for this option in section 18(1)(a).

By amending the RFA Act it will therefore be possible to impose a levy on other fuel forms, for instance LP gas, used for propelling vehicles. As stated above, this is basically an "in principle" provision since there are various practical difficulties in calculating the level of the levy to be imposed, e.g. (a) the per kilometre distance travelled when a specific volume or other unit of the energy source is used will have to be known, and (b) the sale of the energy source must be

adequately under control to ensure that levies are imposed, collected and paid over to the Road Fund. We look, below, at the provisions of the PPE Act in this regard.

5.9.3.2 The Petroleum Products and Energy Act, 1990

Section 19 of the PPE Act provides:

> *"(1) The Minister may with the concurrence of the Minister of Finance by notice in the Gazette or by notice in writing served on any person, whether personally or by post, impose a levy for the benefit of the fund, on every litre of petrol, aviation spirit, kerosene, distillate fuel, residual fuel oil, naphta, base oil, products of base oil or every kilogram of grease or liquefied petroleum gas or any other petroleum product which is manufactured, distributed or sold by an undertaking at any point in Namibia, or imported by any person into Namibia.*
>
> *(2) A levy imposed under subsection (1) may differ according to the purpose for which the product in question is used or the place where or method by which the product in question is sold.*
>
> *(3) A notice referred to in subsection (1) -*
>
> *(a) shall state the amount of the levy, the person who shall be liable for the payment thereof, the product in respect of which it shall be payable, the person who shall be responsible for the collection thereof and the times when and the manner in which it shall be paid to a person mentioned in the notice for the fund;*
>
> *(b) may prescribe that interest shall be payable at the rate prescribed in the notice on any levy received after the date on which such levy was payable;*
>
> *(c) may exempt, in part or in full, any person from any provision thereof, or may contain a directive that the amount of the levy, where the levy is not imposed by notice in the Gazette, or the proceeds of a levy, shall not be disclosed by any person to any unauthorised person, or the notice may contain any appropriate condition."*

We quote the above section as a comparative indication of the type of petroleum products on which levies can be imposed under the PPE Act. Apart from providing a wider base of fuels which may be levied this section corresponds closely with the provisions in the RFA Act as regards a levy imposed on petrol and diesel.

Another relevant provision to this issue appearing in the petroleum legislation is regulation 35 of the Petroleum Products Regulations of 2000 which states in subregulation (2) thereof:

> *"(2) A person shall only with the written permission of the Minister use gas to propel a vehicle or a vessel, other than a fork lift, along any public road."*

"Gas" is defined as "liquid or non-liquid gas which can be used as fuel for the operation of a spark ignition engine".

For background information it is our understanding that the relevant undertaking which intends to commercially develop the use of LPG/autogas has obtained the written approval of the

Minister of Mines and Energy to do so in terms of the quoted regulation 35 above. It is also further our understanding that this project carries the approval of Government in general.

5.9.3.3 The Petroleum Products and Energy Amendment Bill

It is our understanding that the above Bill, which mainly amends the provisions in the PPE Act relating to the National Energy Fund will soon become an Act of Parliament. Although maybe premature it may be of interest to note the provisions appearing in that Bill relating to levies on energy.

> ***"Levies on energy sources***
>
> ***19.*** *(1) Subject to subsection (4), the Minister, after consultation with the council, by notice in the Gazette or by notice served on any person, whether personally or by post, may impose a levy for the benefit of the fund, on –*
>
> *(a) any petroleum product;*
>
> *(b) electricity;*
>
> *(c) natural gas or liquefied natural gas;*
>
> *(d) hydro- or windpower;*
>
> *(e) any other energy source,*
>
> *which is manufactured, generated, transmitted, distributed or sold at any point in Namibia, or is imported into 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 or method by which that energy source is sold.*
>
> *(3) A notice referred to in subsection (1) -*
>
> *(a) shall state -*
>
> *(i) the amount of the levy;*
>
> *(ii) the date on which the levy becomes effective;*
>
> *(iii) the person who shall be liable for the payment thereof;*
>
> *(iv) the energy source in respect of which the levy shall be payable;*
>
> *(v) the person who shall be responsible for the collection thereof; and*

(vi) the times when and the manner in which the levy shall be paid, for the benefit of the fund, to a person mentioned in such notice;

(b) may state that interest shall be payable at the rate determined in such notice on any levy received after the date on which that levy became payable;

(c) may exempt, if there are good reasons therefore, in part or in full, any person from any provision thereof, or may contain a directive that the amount of the levy, where the levy is not imposed by notice in the Gazette, or the proceeds of the levy, shall not be disclosed by any person to any unauthorised person, or the notice in the Gazette may contain any appropriate condition.

(4) In determining and imposing a levy under subsection (1), the Minister shall -

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

(b) in order to, in the longer term, 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 months; and

(c) consider any such other matter as the Minister deems relevant or as may be prescribed.

(5) The Minister 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.".

It is interesting to note that in subclause (1) of the above clause the Ministry of Mines and Energy has decided to broaden the base of energy sources which may be levied to all possible energy sources and not only petroleum related products as in the current PPE Act.

5.9.4. Policy issues

For the purposes of recovering the costs of road use the RFA may impose any one or more of the following road user charges:

- a charge based on the on-road travelling distance of a vehicle (mainly based on the vehicles physical characteristics) - section 18(1)(a) of the RFA Act;
- an annual registration and licensing fee (entry fee if foreign registered) - section 18(1)(b) and (c); and
- a levy on diesel and petrol fuel used on-road - section 18(1)(d).

The purpose of the range of road user charges is to enable compliance with the provisions of section 18(3) which require that charges should enable cost recovery and, to the extent practicable, be equitable and promote efficiency in the use of resources.

As a general rule road user charges should have elements to recover: (a) fixed costs, and, (b) marginal costs. The latter are necessary both to ensure equity (section 18(3)(a)) and to promote efficiency in the use of resources (section 18(3)(c)). As stated previously, the levy on fuel was selected as a road user charge because fuel consumption can be regarded as a reasonable "proxy" for road "consumption". Where fuel consumption is not a reasonable proxy for road use, as is the case for very heavy vehicles, additional mass-distance type charges (section 18(1)(a)) must be considered to ensure equity between different categories of road users. If it were practical and administratively cost effective to measure the on-road travelling distances of individual vehicles the levy on fuel would not be necessary for purposes of recovering the road "consumption" costs of vehicles. The mass-distance or "travelling distance" charge under section 18(1)(a) would then be the ideal charge for this purpose, specifically also because this charge can be adjusted to the physical characteristics and loading of vehicle classes or individual vehicles. It should also be noted that the use of vehicle registration and licensing fees for purposes of recovering the fixed costs of road use, particularly if they are set to recover a relatively large part of the costs of road use, are inherently inequitable since the per kilometre road use cost of vehicles, even within a specific vehicle class, may vary widely from one vehicle to another, depending on their annual travelling distances. For this reason the main cost recovery charges must be those related to road "consumption", namely the mass-distance charges and the levies on fuel.

Against the above background any vehicle powered by an alternative source of energy, e.g. fuel gas, electricity or solar power, or a combination of these with petroleum fuel, would have to pay an annual vehicle registration and licensing fee in the usual way and a "consumption" type charge which would have to be based either on its consumption of the fuel concerned or on its on-road travelling distance. Currently the RFA Act does not provide for the imposition of road user levies on fuels other than diesel and petrol. The RFA therefore has two options with regard to vehicles using alternative energy sources: (a) It must amend the RFA Act to include for the imposition of road user levies on such fuel types (which in the case of solar energy would not be possible) or (b) impose a charge under section 18(1)(a) based on vehicle travelling distances.

Unless the sale of alternative sources of energy is regulated in a way which will facilitate the collection of any levy imposed on the selling price of such energy sources, and unless the use of such energy sources becomes wide-spread, an amendment of the Act may not be of much practical use. Nevertheless, we would recommend that the Act be amended so that other forms of fuel used to propel vehicles on roads may be levied and that the RFA has adequate powers to impose and collect such levies. The option to charge such vehicles for their road "consumption" by way of a charge under section 18(1)(a), i.e. on their travelling distance, will always still be available. An appropriate way of measuring travelling distance will have to be found. In the absence of any suitable equipment reliance may have to be placed on a sealed odometer in the vehicle.

5.9.5. Concluding observations about legislation

Our concluding observations are that:

(a) The present legislation does not allow the RFA to impose a fuel levy on any other energy source than petrol and diesel;

(b) there are examples in Namibian legislation whereby levies may be imposed on a broader spectrum of energy sources;

(c) to enable the RFA to impose levies on all energy sources would require a relatively simple amendment to the RFA Act but problems may be experienced in the manner in which the levy should be calculated and on what basis it should be imposed. Moreover, since the legislation adequately deals with the principles underlying the imposition of any levy on fuels it would be possible to amend the Act to provide the RFA with the powers it will need not only to include LPG/autogas but any type of energy source which may in future be applied in this regard; and

(d) it is probably not a practical solution to impose road user levies on fuels other than the present petrol and diesel fuels and any amendment of the Act to provide for other fuels would be mostly an "in principle" option.

5.9.6. Recommendation

(a) That the RFA Act be amended to allow the RFA to levy any energy source which is used to propel a vehicle on a public road;

(b) if the above recommendation is accepted, the following should be given attention:

(i) provision of additional powers to the RFA as regards the calculation of such a levy and the manner in which it will be imposed;

(ii) that such amendment should be effected in such a way as to prevent the user pay principle being infringed due to new energy sources being developed as means to propel vehicles on public roads.

5.10. Additional issues : Section 16 : Donor and other funding

5.10.1. The issue

During the Working Meeting held between the team members and Mr G Seydack of the RFA on 6 to 8 May 2004, the Group was requested to point out in this Report that certain difficulties of interpretation are being experienced in respect of paragraphs (b) ("State funds") and (f) ("donor funds) of section 16(1).

5.10.2. Discussion

The introductory sentence of section 16(1) and paragraphs (b) and (f) thereof provides:

"16. (1) There is hereby established a fund to be known as the Road Fund into which shall be paid –".

(b) moneys appropriated by Parliament;"

(f) any donation or grant made in respect of any project or programme."

The problem is that the introductory sentence in effect provides that all types of moneys listed in the various paragraphs of that section *must* be paid into the Fund. This may create the wrong impression, since it does not *ipso facto* follow that all moneys originating from the State budget or donor agencies should necessarily be paid to the Fund. Thus, it is possible that the State or a donor agency may wish to transfer appropriated moneys or a donation directly to the Roads Authority or to a Ministry (e.g. the Ministries responsible for Transport, Home Affairs, etc.) or to contractors for the payment of services rendered, etc. and not to "channel" it through the Road Fund (or the RFA for that matter) as they apparently are obliged to do in terms of a strict interpretation of the provisions of section 16 of the Act. However, where a donor does not wish to deposit money which is earmarked for a specific purpose into the Fund prior to payment or even to channel such money through the Fund for payment purposes, the Act should not be restrictive.

Since it remains necessary for the purposes of clarity to spell out the different categories of moneys, it is therefore not proposed that paragraphs (a) to (j) of section 16(1) should be deleted. However, since it is not the idea to prescribe to the Government, donors, etc., the Act should be amended as suggested below.

Finally, it needs to be pointed out that paragraph (b) of section 16 (1) should also be amended by adding the words "in respect of any project or programme". This will promote clarity (see paragraph (f)).

5.10.3. Conclusion and recommendation

Section 16(1) needs to be amended to make it clear that moneys accruing to the RFA under the types of money listed in paragraphs (a) to (j) must be deposited in the Fund. Subsection (1) should merely mention that the Act establishes the Road Fund. A subsection (1A) could be inserted after subsection (1) which provides that: "The Administration shall deposit the following types of moneys in the Fund:" No obligations should be created on the Government and donor agencies. Paragraph (b) of that subsection should be amended as suggested.

6. SECONDARY LEGAL ISSUES INVOLVING THE RFA ACT

6.1. General remarks

6.1.1. Issues addressed

The following issues, which the Client has requested to be dealt with as secondary legal issues, are addressed under this heading.[104] The headings have been amended and the issues regrouped in a manner more appropriate to a discussion of the relevant provisions of the Act as follows:

(d) Principles with regard to the financial management of the Road Fund[105]

[104] Note that the Client's guiding instruction on issues under this heading was: "The Consultants should therefore limit their work on these issues to a brief synopsis of findings and opinions with regard to these, which would allow the RFA to assess the need in future to address these issues separately on merit.".

[105] Any references in the text below that imply that the Fund is a legal person should be read with the later discussion of the legal status of the Road Fund in paragraph 6.2.

(e) Adequacy of budgeting procedures and business plan
(f) RFA Performance Statement to the Minister of Finance
(g) Accountability (financial reporting) of the RFA
(h) Annual report
(i) Legislative requirements regarding consultation with stakeholders
(j) Dispute and complaints regulations

Some of the above issues have a common theme, namely that they concern the RFA's accountability and reporting obligations. These obligations are quite comprehensively spelt out in the RFA Act and are important because they are intended to put different stakeholders in a position to evaluate whether the RFA is managing the road user charging system properly and in such a way that their specific interests are protected. For instance, road users would be interested to know what the rates of road user charges are going to be; the Roads Authority would wish to be assured that future funding levels will be adequate to ensure that roads maintenance backlogs can be eliminated; the Minister of Finance would wish to be assured that the road sector is operating efficiently; the Minister of Mines and Energy wishes to know what the proposed future fuel levies will be; creditors (and guarantors) would wish to be assured that Road Fund's financial position is sound; etc.

However, the Act does not in all instances specifically define the content to be included in reports. Since the RFA has a unique function and the criteria in accordance with which the RFA's performance should be evaluated are probably not well understood by most members of the general public, and in many instances not even by interested parties, considerable importance attaches to the way in which reports are presented. The RFA's unique function is not necessarily amenable to conventional reporting practices. Ultimately, the RFA's stakeholders, some of whom have been mentioned above, need to be placed in a position to monitor the RFA's performance so that they can satisfy themselves that their interests are being adequately served.

6.1.2. Basic philosophy underpinning management and reporting

In this regard it is worthwhile to again take note of the basic philosophy underlying the organisational restructuring proposals which emanated from the Road Sector Reform[106] namely that the new organisational entities would be able to function most effectively if they:

(a) Are given explicit objectives to achieve;

(b) are provided with the relevant expertise;

(c) have sufficient powers; and

(d) can be held accountable for their performance.

The above philosophy will therefore guide the discussion of the issues as indicated above. Where some of the issues (e.g. budgeting procedures and disputes and complaints regulations) do not necessarily fit into the above (reporting) framework they are dealt with in accordance with policy principles relevant to the specific issue.

[106] See reference no. 10 in Annexure B.

6.2. Principles with regard to the financial management and status of the Road Fund

6.2.1. The issues

The Act, contrary to its general philosophy of being specific about objectives and the principles to be applied in the performance of functions, does not provide guidance as to what constitutes compliance with the requirement in section 16(2) of the Act that the RFA should manage the Road Fund *"in accordance with sound principles of financial management, and by observing in particular the measures implemented to protect the liquidity of the Fund as contemplated in section 22(1)(d)"*. (Section 22 deals with the RFA's performance statement.)

There are two reasons why it may be necessary to attach a definition to the expression "sound principles of financial management". Firstly, the Road Fund's financial position cannot always be evaluated in accordance with conventional accounting practice such as required in terms of generally accepted accounting practice (GAAP). Secondly, the Road Fund's longer-term financial obligations can be both of a purely "financial" nature (e.g. contractual loan liabilities) or a "statutory" nature (e.g. to provide adequate funding to the Roads Authority or other approved authorities to ensure an economically efficient road sector).

A definition of the RFA's financial management function could clearly separate the management of purely financial aspects from the management of the road user charging system so that these two functions can be separately assessed. Such a definition would imply that the RFA's performance in terms of its management of the road user charging system would then have to be assessed by other means than the Fund's financial statements, unless the latter are in future presented in a different format. (The Fund's books of account are discussed in paragraph 6.5 hereafter.)

A further issue, related to the above, which was referred to the Consultants,[107] concerns the legal status or *persona* of the Road Fund. Some of the questions posed were:

(a) "Would it therefore not be more appropriate to give the Road Fund the status of a separate legal person?"; and

(b) "What does it mean that the RFA is managing the Road Fund? For whom? Whose money is it anyway? What is the Road Fund really? Should it merely be regarded as a "bank account", or should it have some more formal status?".

The view was also expressed that: "the Road Fund is money kept in trust for various involved parties: mainly road users, because it contains the money collected from the RUCS, and Government, because it pays contributions into the Road Fund, and to a lesser extent donors, who also pay money into the Road Fund. Reference was also made to the fact that "the Board of Directors, according to accounting practice, have to express themselves on whether the Road Fund fulfils the requirements of being regarded as a "going concern[108]", while its liabilities far exceed its assets and as an organisation it would be technically bankrupt." This then raised the question:

[107] See e-mail message from Mr Seydack of the RFA dated 1 April 2004.
[108] Concise Oxford Dictionary, 2002: "Concern: 3. a business"; Oxford Thesaurus, 2001: "Concern: 6. company, business, firm, organisation, operation, corporation, establishment, house, office, agency".

(c) "So who is bankrupt now - the Road Fund, which doesn't have any legal persona, or the RFA, which only manages it?".

The core problem was seen as "the fact that, with accounting and auditing for the Fund being performed in accordance with standard procedures, by lack of any further guidance by the Act other than requiring management according to sound principles of financial management, an accounting monstrosity has been created, in that the Road Fund is now treated and accounted for like a "concern", while it is not, and the Board needs to state whether the Fund is a "going concern", while this question should never even arise due to the Fund not being a concern at all.". The issue here is therefore not even whether separate accounts should be kept for the Fund.

We will therefore also address the following issues:

(a) The interpretation of "sound principles of financial management" as it applies to the Road Fund;

(b) The further issues raised in regard to:

(i) whether it would not be more appropriate for the Road Fund to have its own legal *persona* or status;

(ii) whether the Act should oblige the RFA to keep separate accounting records for itself and the Road Fund

(iii) whether accounting problems (referred to as an accounting "monstrosity") should be resolved by making the Fund a legal person, and possibly appointing the RFA not only as managers but also as trustees of the Fund; and

(iv) the need to for changing the accounting rules for the Fund, if need be by means of regulations?

It should be noted that (a) and (b) are related and that a number of further important questions are raised which are touched upon herein but which it may not necessarily be possible to fully and finally address in this Report. The discussion of this issue also relates to the discussion of the issues under (c), (d) and (e) of paragraph 6.1.1 above.

Finally, section 17(5) of the Act which states: *"Notwithstanding this Act or any other law, the assets of the Fund shall not be subject to attachment or sale in execution*" is investigated since this may shed further light on the status of the Road Fund.

6.2.2. Discussion

Implicit in the issues as formulated above is whether there is a difference between the management of the Road Fund from a purely financial point of view and the Fund in its role as part of the road user charging system and, if such a distinction is made, whether the distinction should be reinforced by way of the financial reporting obligations imposed on the RFA by way of the Act (see section 24 of the Act dealing with accounting and auditing).

From a short-term point of view, or a "liquidity" point of view, it would generally be possible to evaluate the RFA's financial management of the Fund in accordance with conventional accounting practice.

It is therefore submitted that "sound principles of financial management" should at least be interpreted as meaning that the Road Fund should be managed in such a way that it does not experience liquidity problems. Section 16(2) of the Act, specifically because it also refers to section 22(1)(d) dealing with the RFA's measures to protect the liquidity of the Fund, reinforces this interpretation. The conclusion herein is that the provisions of the Act, in section 16(2), are adequate in respect of the RFA's *short-term* financial management responsibilities. These responsibilities should, however, be given content by expanding the provisions of the Act or by promulgating regulations under section 28(e) ("management and control of the Fund") of the Act so that specific financial management objectives are identified, e.g. management of debt, collection of road user charges, cash flow scheduling, etc. One of the aspects of the RFA's financial management which could be given attention in this context is that the financial statements are not required to make a comparison between the financial projections contained in a business plan and actual financial results as reflected in the end of year income statement. There is therefore no way of assessing whether or not the RFA (and the RA and other approved authorities for that matter) exercises sound financial control and discipline in adhering to the business plan.

A more important and also more difficult question is whether "sound principles of financial management" should be interpreted as also implying a responsibility to ensure the Fund's long-term solvency. In responding to this question it should again be noted that the Fund's long-term financial obligations can be classified into "contractual financial obligations" or "financial obligations" and "statutory financial obligations". The former refer to liabilities such as long-term loans which the RFA is legally bound to repay. Long-term creditors, although they would usually have the security of a Government guarantee, would also be interested in the RFA's accounting records[109]. From a strictly financial accounting point of view the RFA is unlikely to ever become "insolvent". The RFA can, however, become "statutorily insolvent" if it is unable, whether through poor management or external factors, to provide adequate funding to efficiently manage the national road network and to fund various approved authorities. This could happen, for instance, if the RFA over-commits itself to loan funding and later finds itself in the position that most of its revenue must be used to service loans rather than to achieve its basic mandate of ensuring an efficient road sector. Alternatively, the RFA could find itself in the position that it is unable to implement adequate road user charges due to reasons outside its control and that it is therefore unable to comply with its basic mandate of ensuring an economically efficient road sector. However, there is no provision in the RFA Act which defines the concept "statutorily insolvent" nor is there any "qualitative" provision in the RFA Act which refers to the responsibility of the RFA to manage the road user charging system which is similar to the section 16(2) provision requiring the RFA to manage the Road Fund according to "sound principles of financial management. In fact, section 15(1) of the Act, although it refers to the RFA's function of managing the Road Fund, does not directly refer to its function of managing the road user charging system but does so by referring to the different determinations to be made by the RFA (amount of funding, manner of funding, rates of road user charges) and then also in a

[109] The RFA has confirmed this. According to the RFA "a financial expert availed by the GTZ had advised that financiers would look very critically at the governance (again!), financial management and records of the RFA, because they should not have to rely on a bail-out by Government, even if this is a last resort".

sequence which does not agree with the definition of the road user charging system in section 1 of the Act.

Since conventional "solvency" and "equity" principles do not apply to the Road Fund they should therefore not be included in the definition of "sound principles of financial management" in relation to the Road Fund. However, the Act should preferably refer to the RFA's management duties with regard to both "sound principles of financial management" and "sound management of the road user charging system" and, as already suggested with regard to the former concept, the concept "sound management of the road user charging system" should also be defined in the Act or by way of regulations. The latter concept is more appropriately discussed as part of the further issues referred to the Consultants.

We therefore turn now to the further issues referred to the Consultants, namely, the need for the Road Fund to be a legal *persona*, the need for separate accounting statements for the RFA and the Road Fund ("since it is neither an entity nor an organisation in its own right") and how to resolve accounting problems. Further specific questions were: (i) what is the meaning of "management of the Road Fund", (ii) who owns the money in the Road Fund, and (iii) what the real status of the Road Fund is? (Is it only a "bank account", or should it have some more formal status? Who becomes bankrupt if the Road Fund is bankrupt, is it the RFA?)

In our view it would make no sense for the Road Fund to be given the status of a legal *persona*. In this regard the RFA should therefore not be amended. The Road Fund is at most the "bank account" of the road user charging system and, as indicated above, the "financial status" of the Road Fund, as reflected by its balance sheet, in reality reflects the RFA's management of the road user charging system. We have argued above that there is both a short term "liquidity" aspect to this management which can be evaluated in terms of conventional financial management criteria and a longer term "solvency" aspect which cannot really be evaluated in terms of conventional financial criteria. We note that the Road Fund cannot really become "bankrupt" in the conventional sense (e.g. by being declared bankrupt in a court of law and with long term creditors then suffering damages[110]).

However, we identify "management of the road user charging system", which is one of the core functions of the RFA (see section 3 of the Act and section 15(1)(b), (c) and (d) read with the definition of the road user charging system in section 1 of the Act[111]), as a function which should also be performed in accordance with "sound principles". If the road user charging system as such is poorly managed the implications could be one or more of the following: (i) revenues from road user charges may have to be used to an unacceptably large extent for the repayment of past loans rather than for the management of the national road network (and related expenditures), (ii) road user charges may have to be increased to much higher levels than if "sound management" had been the case, (iii) expenditure on roads and related matters may be below the required "economically efficient" level – with consequent implications for the service levels of the national road network and the efficient performance of the Namibian road sector, or (iv) the Government may have to step in with financial support to "bail out" the Road Fund (in effect the road user charging system or, in the final analysis, to "save the national road network".)

[110] In view of the fact that such creditors would normally have the security of a Government guarantee.

[111] We again note the fact that section 15(1) of the Act could be amended to refer to "management of the road user charging system" rather than the separate determinations under section 15(1)(b), (c) and (d) which, moreover, do not follow the sequential order emphasised in the definition of the road user charging system in section 1 of the Act.

At this point, to answer one of the questions raised, we therefore confirm that it in our view the accounting records of the RFA and the Road Fund should continue to be kept and kept separately. One of the reasons is that the RFA is itself funded from the Road Fund and is for all practical purposes an "approved authority" of the same type as the Roads Authority in as much as that they are both dependent for their functioning on funding allocations from the Fund[112]. The RFA, further, can also contract to provide certain services in own right, e.g. those in terms of section 15(1)(g) and (h), against payment of compensation. It should be noted, however, that the RFA and the Roads Authority differ from approved authorities such as local authorities which have their own funding sources. The management of the RFA as an entity in itself and the management of the road user charging system (the main task of the RFA) are therefore two separate matters and it makes good sense to separate their financial affairs and financial reporting.[113]

However, the questions which have been raised about the status of the Road Fund and the lack of ready to hand answers indicate that some wider thinking is required. Some of the answers are found in the opinion provided by Prof Gerhard Erasmus as part of the discussion of another issue (see below). However, since this opinion was not specifically requested to address the matter of the Road Fund's status (it addresses mainly section 17(5) of the Act) it only provides some insights. In view of the Client's indication that secondary legal issues should only be addressed to the extent that it would allow the RFA to assess the need to in future address these issues separately on merit, we have refrained from requesting Prof Erasmus to elaborate his opinion.

The RFA is a creature of statute created to manage the road user charging system. As pointed out in our Inception Report, and also again earlier in this Report, the function referred to as "management of the road user charging system" conceptually comprises two separate functions, namely the "regulation" of road funding and the "securing and allocation of sufficient funding" (cf. section 3 of the Act). The former is executed in accordance with the "economic efficiency principle" and the second is based on the "user pay" principle (allied, of course, to the "equity" and "pricing signals" principles). In theory it would even be possible to have different entities performing these functions[114]. Our view is that, similar to the RA which manages the national road network *on behalf* of the Minister responsible for transport without *acquiring ownership* of that asset, the RFA, upon a strict interpretation, "regulates" road funding and manages the road user (or road taxation) system *on behalf* of the Minister of Finance, also without *acquiring ownership* of the funds *in* the Road Fund[115]. If we were to go

[112] See for instance the provisions of section 17(1)(*l*) of the Act permitting the settlement of claims against the Authority from the Fund.

[113] Here we also wish to note that in our opinion the present format of the RA's and the RFA's financial statements do not really reflect the business and transactions of the two entities in accordance with their unique characteristics. For instance, to refer to a deficit or a surplus in income makes no sense. Both entities are by definition fully funded and any substantial deficit or surplus should in fact be explained. A much more useful benchmark of performance would be a comparison between actual expenditure and the business plan. However, a further discussion of this matter would fall outside the scope of this Report.

[114] It could even be argued that it would be very desirable to separate a purely "regulatory" function from what is in reality an "operational" function. However, we will refrain from further digression herein.

[115] Although we will not develop this "management on behalf" concept further in this Report, we believe that there may be grounds to apply this concept to the RFA's liabilities with regard to VAT. If the RFA is in fact levying taxes or levies *on behalf of* the State, in other words the levying is really "by the State" (cf. the amended section 4(1)(v) of the VAT Act) the RFA's activities would not be included in the definition of "taxable activity". Again, this interpretation would need to be confirmed by further study.

further we would also argue that the moneys **in** the Road Fund (or its assets) cannot be anything else but "public funds", although with the characteristic that they are by law earmarked for expenditure related to the national road network (or the "road sector").

On the basis of the above we therefore respond to the issues which have been raised as follows:

(a) Regarding the question what is the meaning of "management of the Road Fund", we are of the view that this comprises two parts:

(i) the *short term* cash flow management of the Road Fund which should be reported on and evaluated in accordance with conventional accounting practice, albeit that this should be given more specific content; and

(ii) the *longer term* management of the road user charging system in terms of road sector economic efficiency criteria. This means that management should be defined as covering aspects such as the optimum long term stable funding level (broken down into suitable components, e.g. gravel road maintenance, rehabilitation of the paved road network, road network development, etc.), the current road user charges revenue level (net of collection costs), the current rates of road use charges, the projected rates of road user charges, the loan funding balances and annual repayment obligations, etc. The above should be incorporated into a customised financial reporting format which should of necessity be able to show longer term cash flows in present value format so that a "balance sheet" approach is possible. It is assumed that provision will have to be made for risk aspects and for "ratio analysis". The details should be further developed and then prescribed by regulations. In our view the Act does not necessarily have to be amended since the Minister is empowered in terms of section 28 to make regulations in relation to any matter necessary to give effect to the objects of the Act. However, to counter possible objections from parties used to conventional accounting practices some suitable empowering provisions can be included in the Act;

(b) does the Road Fund need to be a legal *persona*? We are of the view that the answer is negative. However, the RFA manages the Road Fund in a way which suggest that it is the independent trustee of revenues which have been raised from road users. An amendment of the Act would be necessary only if there is an expressed requirement to more clearly spell out the position with regard to the moneys in the Road Fund on the basis of our interpretation above;

(c) as far as the ownership of the money in the Road Fund is concerned, our view is that the moneys in the Fund are public moneys and accrue to the State, with the proviso that the moneys may only be used for the purposes listed in the Act (section 17(1). Again, this could be spelt out more clearly in the Act if required;

(d) the status of the Fund is that of an "account" and in our view it needs no further qualification other than that the moneys in it should be clearly reserved for a specific use – but this is already the case;

(e) can the Fund become "bankrupt"? We believe that, in a conventional accounting sense[116], this is not possible since the Government would in the final instance always be accountable for any debts which the RFA, as managers of the Road Fund, are unable to meet from the moneys in or available to the Road Fund (from the road user charging system) at a specific point in time. In other words, even although the Road Fund is not a legal person its debts, if the previous interpretation is accepted, would devolve on the Government. However, there should not be any problems in referring to the Road Fund (in the sense of it being an "account") as being in a sound position or otherwise (i.e. a "going concern" or "bankrupt" – although more appropriate expressions should be found or prescribed by regulation). It should be accepted that the Fund could be in a position (if a special, customised accounting system has been introduced) where it is unable to adequately fund the national road network and which would indicate that the Government should intervene. This would in a sense be a "bankrupt" Road Fund.

(f) should the accounting rules for the Road Fund be changed? In our view the answer is that the accounting rules should most definitely be changed. The issue is to define the circumstances which are regarded as reflecting a "sound position" of the Fund (or in reality that the road user charging system is being managed in accordance with the RFA's mandate to achieve an economically efficient road sector), or alternatively the circumstances which indicate that the road user charging system is not being managed so as to achieve its above mandate. It is of course an open question whether it is at all possible to reflect "sound management of the road user charging system" by way of financial information alone. In other words, is this a purely accounting issue? We are of the view that it would be possible to develop a customised combined financial accounting and reporting system which would be able to show whether the Fund is in a sound position or not (interpreting that references to the "Fund" are in fact references to whether or not the RFA is managing, or being allowed to manage, the road user charging system so that the RFA's mandate is being achieved or is in the process of being achieved).

Finally, in the context of the Fund's legal *persona* and possible judgements against the Fund, we note that section 17(5) of the Act provides that "*notwithstanding this Act or any other law, the assets of the Fund shall not be subject to attachment or sale in execution*".

We have obtained an opinion from Prof G Erasmus of the University of the Stellenbosch Law Faculty on the matter of both the legal *persona* of the Road Fund and on section 17(5) above. It is entitled "The Nature of the Fund and the Position of its Assets" and is reproduced below.

"THE NATURE OF THE FUND AND THE POSITION OF ITS ASSETS

1 There seems to be uncertainty as to whether the Fund is a legal person. I have been asked to comment on this aspect. I have also been asked to comment on the effect of Section 17(5). This provision reads: "*Notwithstanding this Act or any other law the assets of the Fund will not be subject to attachment or sale in execution.*"

2 There seems to be uncertainty as to who "owns" and controls the assets in the Fund. On this point the relationship between the RFA and the Fund is not quite clear. The same is true of other matters such as bookkeeping requirements and some of the purposes for

[116] A person judged by a law court to be unable to pay his debts in full.

which the money in the Fund may be used. This part of the opinion will therefore deal with the following aspects:

- Is the Fund a legal person?
- What is the nature of the assets in the Fund and who manages the money paid into the Fund?
- What is the effect of Section 17(5) which states that the assets of the Fund shall not be subject to attachment or sale in execution?

3 My instructions are that the Fund was intended to be established as an **account for the money collected as fuel levies and other road user charges under the road user charging system.** If this is true then the true nature of assets in the fund and the identity of the "account holder" must be clarified. If the RFA is the "account holder" and if the Fund has been established only for the purpose for providing a public account facility to the RFA to manage the income collected via the road charging system, then the latter manages that account for that purpose. Whether this is indeed the position is not entirely clear. The structure of the RFA Act and the provisions in Sections 16 & 17 of the Act may provide guidance on this point.

4 Section 16 provides for the establishment of the Road Fund. Section 1 of the Act defines the Fund only to mean "the Road Fund established by Section 16". The effect is that a specific public account is now established through the Act.

5 Section 16(2) reads: *"The Administration shall manage the Fund in accordance with sound principles of financial management, and by observing in particular the measures implemented to protect the liquidity of the Fund as contemplated in Section 22(1)(d)."* This provision lends support to the argument that the Fund is indeed an account for the Administration and that it shall manage the Fund in a particular manner and for a specific purpose. The Administration manages the Fund in order to give effect to and implement the objectives of the RFA Act. It also has the responsibility to protect its liquidity. For the latter purpose Section 22(1)(d) provides for certain measures to be implemented by the Administration. The Minister also exercises a type of oversight function in the sense that Section 22(1) provides that the Minister must be enabled, through a draft performance statement submitted by the Administration, to assess whether the objects of this Act are indeed achieved. This includes oversight over policies regarding investments and borrowing by the Administration and the protection of the liquidity of the Fund.

6 The overall structure provided for in the Act with respect to the objective to secure the sound administration of the Fund therefore seems to be the following:

- The Fund is established in terms of the Act. It is a public account.
- The Fund forms an integral part of the road user charging system. This indicates how and for what purposes the Fund is to be utilised.
- The ultimate objective is to secure sound management of all monies collected under this system and paid into the Fund.
- The Administration manages the Fund and has to ensure its sound financial management and protection of the liquidity of the Fund.
- The Administration can be held accountable for how it performs this function.
- The Minister performs an oversight function.

- The RFA has to adopt and implement certain measures with respect to its obligation to protect the liquidity of the Fund.

7 Another distinction should also be drawn. The assets of the Fund refer only to the monies (coming from different sources) paid into the Fund. The roads and infrastructural assets of Namibia are a different matter and do not form part of the assets of the Fund.

8 If this line of reasoning is correct then the Fund is not a separate legal person who "owns" the money paid into the Fund. The assets in the Fund are of a particular nature. These are public funds collected under the road charging system and have to be used (only) for achieving the objectives of the Act and "to the extent that it is to the benefit of road users". The Administration is responsible for and manages the Fund, but it does not "own" it in the popular sense of the word. It can only use these funds for a specific purpose. Public funds are to be used as determined by the applicable statute.

9 Section 17 of the Act is also important because it contains the provisions on exactly how the Fund has to be utilised. This Section provides quite clearly that the Administration shall (only) utilise the money available in the Fund for the purposes listed in that Section.

10 The bookkeeping system with respect to this arrangement created by the Act is not explained in the Act itself. Any bookkeeping system will, however, have to give effect to the principles as reflected in the Act and supplemented by the subsequent measures on the protection of the liquidity of the Fund.

11 Can the RFA purchase immovable property for itself from the assets in the Fund? Section 17(1) (b) provides for the utilisation of the Fund to "defray the Administrative expenditure of the Administration, including expenditure relating to the road-user charging system". But this may only happen "to the extent that it is to the benefit of road users". Section 1 of the Act defines administrative expenditure "to include the costs of:

(a) Acquiring immovable property for administrative purposes,
(b) The advisory services required by the Minister or the Minister responsible for Transport in the performance of his/her functions under this Act or the Roads Authority Act.

If the Administration would, therefore, "acquire" (that is purchase or rent/lease) an office block because of administrative needs, then it would apparently be a lawful expenditure, provided that such a property must indeed be necessary in order to provide for the administrative needs of the Administration. (It cannot be rented out to generate income.) Such expenditure will have to be fully justified, reflected in the bookkeeping system applicable to the activities of the Administration and should take account of the oversight function of the Minster.

12 The ultimate criterion in the utilisation of any of the monies in the Fund is that it must be "to the benefit of road users" as stipulated in Section 17(1). The financial needs of the Administration with respect to its own functioning must be limited to the effective performance of its obligations. These are the only grounds on which expenditure on

immovable property can be justified. These may not be very exact criteria; that is why ministerial oversight, "political" and parliamentary control are part of the picture. Ultimately this is how all public funds are controlled. The yardsticks to be used are the relevant legislation and other law applicable to public spending on the use by government of the taxpayer's money. That is why state budgets are to be approved by Parliament. If the relevant legislation, in addition, also provides for special complaint procedures, that will also apply. Administering the RFA does not ipso facto require the purchasing of its own office building. The RFA can presumably be housed quite effectively and cost-effectively in rented property or even in separate government accommodation. Whatever decision is eventually taken should take account of all these factors. Any such decision will have to be justified and explained along these lines. This should impose a particular form of discipline in financial management and on the actions of the Administration.

13 What is the effect and meaning of Section 17(5) which provides that "the assets of the Fund shall not be subject to attachment or sale in execution"? The explanation provided to me was that this provision was included in the Act because this is habitually done in legislation dealing with finances of state organs. There are some problems with respect to this formulation and the manner in which this provision relates to the principles discussed above. If it is indeed correct, as argued above, that the Fund is not a separate legal entity but a public account to be used as provided in the Act and managed by the RFA, then it cannot mean that the assets mentioned in Section 17(5) are those **of** the Fund. The provision presumably means the assets **in** the Fund. The RFA manages the Fund. The Fund is a public account for the implementation of the road user charging system and managed by the RFA. The subsequent financial management system and accounting should reflect this position. Section 17(5) does not, in its present form, do so adequately.

14 Should a provision of this kind be in this legislation at all? The explanation given to me was that it was added without necessarily explaining financial management and accounting but to deal with the traditional concerns about public assets. But then it becomes a matter that is more correctly to be viewed as part of those legal principles dealing with state liability.

15 State liability as a public law concept has a complicated history. As Baxter (p622) explains; the rule in South Africa until 1888 that it was not possible to hold the Crown liable for the delicts of its servants, stems from the ancient feudal maxim that "the king can do no wrong". In other words fault could not be attributed to the Crown. This ancient approach obviously cannot cater for the activities and needs of modern societies. Even in England a practice developed whereby the Crown "would in fact pay on behalf of its official whenever it would have been liable had it been a private employer" (Baxter at 624). On the formation of the Union of South Africa the colonial legislation on this point was replaced by the Crown Liabilities Act, 1 of 1910. In 1957 South Africa adopted the State Liability Act and this was subsequently amended to reflect some of the changes brought about by the interim Constitution of South Africa of 1994.

16 The position in Namibia is apparently that the Crown Liabilities Act, 1 of 1910 still applies. This Act was extended to South West Africa by Section 1(1)(b) of the Railway Management Proclamation 20 of 1920. According to *Mwandingi v Minister of Defence* 1990 NR 363 (HC) at 377C-D (approved of on appeal in *Minister of Defence v*

Mwandingi 1993 NR 63 (SC) at 77C-F), "the Crown Liabilities Act 1 of 1910 was extended by the Railway Management Proclamation 20 of 1920 territory. It is true that it was so extended for purposes of that proclamation, but the Act applied in its entirety and it seems to me, once it was extended, it was accepted by our courts as also binding on all other, at that stage, departments (see *Hwedhanga v Cabinet for the Territory of South West Africa* 1988 (2) SA 746 (SWA); *Binga v Cabinet for South West Africa & Others* 1988 (3) SA 155 (A))." (The text of the 1910 Act has been provided to the Consultants. Note the content of paragraph 4: *"No extension or attachment or process in the nature thereof shall be issued against the defendant or respondent in any such action or proceedings aforesaid or against any property of His Majesty, but the nominal defendant or respondent may cause to be paid out of the Consolidated Revenue Fund, or, if the action or proceedings be instituted against the Minister of Railways and Harbours, out of the Railway and Harbour Fund, such sum of money as may by a judgement or order of the court, be awarded to the plaintiff, the applicant, or the petitioner (as the case may be).*")

17 The position in Namibia with respect to state liability will also be affected by the provisions of Namibia's supreme Constitution. Article 25(4) of the Constitution for example reads: *The power of the Court shall include the power to award a monetary compensation in respect of any damage suffered by the aggrieved persons in consequence of such unlawful denial or violation of their fundamental rights and freedoms, where it considers such an award to be appropriate in the circumstance of particular cases.*

18 This particular provision only applies in the context of the violation of the fundamental human rights and freedoms provided for in chapter 3 of the Constitution. It is not necessary to analyse this particular chapter of the Constitution in any detail here but it seems very difficult to argue that the manner in which the RFA will operate and will decide on expenditures with respect to the utilisation of the Fund will involve human rights and fundamental freedoms. There is no right to receive public funds in the context of the road-user charging system of Namibia. The RFA Act is clearly dealing with the public good and the management of a national road-user charging system, in cooperation with other relevant legislation and authorities established in terms thereof, such as the Road Authority. Local authorities also do not enjoy "human rights" for the purposes of the management of the Fund. (Their position came up during the discussions because of the fact that they have historically received certain public funds for traffic control purposes.) Such local authorities are state organs of a particular kind (see e.g. Baxter p100) and their entitlements to funding under this Act are governed by the provisions of the RFA Act. Their involvement in this system and their funding from the Fund will depend on the RFA Act itself.

19 State liability is about the liability of the state in its various manifestations for the actions of its servants in the performance of their duties. There is historically a clear delictual aspect here. As stated by Baxter at 622: *The most important public authority is the state. Obviously it can only act through the medium of officials acting individually or collectively, indirect methods are therefore necessary in order necessary in order to hold the state liable for the acts of its agents (as is also the case with other public institutions).*

20 It is suggested that Section 17(5) be deleted. The RFA Act deals with a sophisticated road user and public financial management system. The Act itself should provide the answers on how and when these funds should be spent. Whatever specific remedies and complaint procedures may be available in this regard, can only be those provided by the Act itself; such as the adjudication and complaint procedures. The roads themselves are not part of the Fund's assets and delictual claims arising from e.g. road accidents are a completely different matter. The objective of the Act is to provide for an open and accountable system. The payments made in terms of this legislation must be based on the relevant legislative provisions.

21 The concept of state liability is a different matter and is dealt with in terms of other legal disciplines. The RFA Act does not have to deal with this matter.

22 The liability of the state has been influenced by modern developments and needs. As Wolfgang Friedmann observed: The *corollary to the vast expansion of governmental functions is the elimination of the legal privileges of the State developed in an earlier period, as a relic of history or against the background of a far more limited scope of governmental functions.(Baxter 622.)* The applicable law of Namibia will account for such considerations.

23 Is the Fund is a legal person? It is strictly speaking confusing to try and fit the Fund into the category of a legal person. It is a public account/fund created by statute; as is often done re state funds. That is its legal status. Then we should refer to the assets/money **in** the Fund.

24 The role of the RFA regarding the Fund is explained above. There should now not be any uncertainty re where the money in the Fund comes from, for what purpose it can be utilized and how it is managed by the RFA. The statute is the source of the applicable law. Actions against the state for claims such as e.g. delictual one can be settled in the manner and out of public funds as is normally done and budgeted for by various state departments."

On the basis of the above opinion we believe that what we have concluded above about the Road Fund is placed in further perspective. However, it may be asked whether it is correct to refer in the Act to moneys "accruing to the Fund". In the case of section 16(1)(c), it must be clear that the moneys contemplated there are actually the proceeds of the sale of RFA assets, and that such moneys must upon sale accrue to the RFA itself[117]. Similarly, the references to moneys accruing to the Fund in sections 16(1)(j) and 17(3) should actually be references to monies entrusted to the RFA for the purposes of administration in terms of the Act. In the case of sections 18(3)(a) and 21(2)(c), it would merely be necessary to refer to "the (estimated) income in the Fund".

In conclusion we would then note that conventional accounting practice cannot be applied to the Road Fund and that expressions such as "a going concern" should be avoided and that appropriate words should be found and be given specific content by way of legislation (or

[117] However, the RFA's assets are ultimately assets of the road user charging system and should "accrue" or be paid into the Road Fund (see also section 19(2) of the Roads Authority Act in this regard). It is therefore recommended that the RFA Act should have a similar provisions as section 19(2) of the RA Act and that section 16(1)(d) also be amended to make it clear that moneys are not to be paid *to* the Fund, but *into* the Fund.

regulations). The Road Fund itself cannot "own" assets and liabilities, because it is not a person, but an account. The balance of monies in the Road Fund is therefore not an asset of the Road Fund, but merely a balance of monies **in** the account. Conventional balance sheet accounting for the Road Fund does not make sense but this does not mean that no accounting should be attempted. A customised accounting system comprising a balance sheet and an income statement should be prescribed. It should deal with: income and expense accounting, deposits into, withdrawals from, and balance of the monies in the bank account (Fund account). The latter should, however, also cover future moneys expected to become available to the road user charging system as well as liabilities (contractual and "statutory"). Similar to standard balance sheet accounting which requires that a person, natural or legal, actually owns the assets and is responsible for the liabilities, and owns the difference (which is equity) the system should seek to create equivalent concepts. The way in which the Road Fund is established in the Act must be investigated so that it creates clarity about who the owner of the assets in the Road Fund is and who the "person" responsible for the liabilities of the Road Fund really is. It is recognised that the situation created is currently an unfortunate mix of a State fund with attributes suited to the manner in which the State usually creates funds under its own control. In the case of the RFA the Road Fund has been placed under the control of an entity, which is neither the State, nor the owner of the Fund but., which we believe, is acting as the statutorily appointed "agent" of the State. In our view a more relevant accounting solution for the Road Fund can and should be developed. The development of such a system, however, falls outside the scope of this Report.

6.2.3. Recommendation

It is recommended that:

(a) the expression "sound principles of financial management" be interpreted as referring to short-term liquidity aspects and to the usual financial managerial principles relating to the current assets of the Fund; and

(b) that the RFA advises the Minister to promulgate regulations under section 28(e) of the Act in order to:

  (i) establish the above definition;

  (ii) give more specific content to the definition;

  (iii) identify specific criteria in terms of which the short-term financial management of the Fund may be evaluated;

  (iv) require that certain details be included in the RFA's annual report and financial statements;

(c) the concept "sound management of the road user charging system" be given in-depth attention, in the course of which the following should be given attention specifically:

  (i) whether it is necessary to explicitly, by way of the legislation, establish the status of the Road Fund as being an "account" of the road user charging system and nothing else;

(ii) whether it should be explicitly stated in the Act that the assets in the Road Fund are *public* assets, to be utilised as provided for in the Act;

(iii) the way in which the accounting of the Road Fund should be dealt with so that better effect is given to the objectives of the Act in establishing the RFA and the Road Fund and to ensure that financial and other reporting enables stakeholders to inform themselves, in quantitative terms, about the achievement (or non-achievement) of the objects of the Act;

(iv) the extent to which the above matters should be dealt with by way of amendment of the RFA Act itself and by way of regulations;

(d) the provisions of section 17(5) dealing with the assets "of" the Fund be reconsidered and that this section be deleted or amended. Section 17(1) of the Act should be amended to sanction the utilisation of moneys in the Road Fund for expenditures arising from any judgement against the RFA (vide the similar provision with regard to the RA in section 17(1)(*l*) of the Act); and

(e) the phrase "accrue/accruing to the Fund", wherever it appears, be amended appropriately.

6.3. Adequacy of budgeting procedures and business plan

6.3.1. The issue

Section 20 of the RFA Act is reasonably prescriptive regarding the budgeting process to be followed by the RFA and the various approved authorities. Submission of budgets is regulated in terms of the provisions of subsections (1), (2) and (3) while paragraphs (a) and (b) of section 20(4) respectively deal with the sequential determinations in terms of the definition of the road user charging system in section 1 of the Act, namely, firstly, the "amount of funding" determinations, and, secondly, the "manner of funding" determinations (see detailed discussion in paragraph 5.6 of this Report).

The outcome of the budget process is a detailed business plan which provides details of all estimated revenue, including the rates of road user charges, and expenditure as projected for a five-year period. The plan must include an analysis of factors which may affect the implementation of the plan (section 21(2) of the Act).

As far as the budget process and business plan is concerned, the issues addressed herein are whether the Act should:

(a) be improved in respect of the provisions which deal with the preparation and adoption of the plan (this also affects other provisions of the Act such as the Disputes Regulations):

(b) make provision for additional particulars to be included in the RFA's business plan, and in particular whether the determinations in terms of both paragraphs (a) and (b) of

section 20(4) of the Act need to be included in the plan;[118]

(c) require the business plan to include particulars of any funding determinations under section 20(4)(a) which do not fall within the period of a business plan but which have nevertheless been approved *in principle* in terms of section 20(4)(a); and

(d) be amended in respect of the provisions dealing with the publication of the plan (section 21(6)).

6.3.2. Discussion

The Act requires the RFA to "prepare and adopt" a business plan at least two months prior to the commencement of every financial year (i.e. not later than 31st January taking into account that the RFA's financial year commences on 1st of April each year).

It is noted that the period permitted for the RFA to evaluate budget submissions and to prepare and adopt a business plan is two months (the period between submission of budgets[119] and the adoption of a plan). If this period is too short, consideration should be given to amend section 20(1) the RFA so that budgets are submitted earlier by approved authorities. Further, if section 20(7) disputes about budget determinations should be registered before a financial year commences (since it would not be meaningful to consider a dispute about a specific project or programme if such has already commenced), it may be desirable to require the RFA to adopt a business plan more than two months prior to the commencement of a financial year.

The business plan is the RFA's approved budget. It should be noted that the adoption of the business plan is not an additional decision-making process but, with the exception of the

[118] We note that section 21(2)(a) only requires particulars and an analysis of the section 20(4) determinations in respect "the ensuing financial year" to be included in a business plan rather than the "ensuing financial year and each of the four financial years following thereafter". It is not clear whether this is an error on the side of the Legislator or whether it was formulated in that way on purpose. The RFA argued that the provision in its current form is not necessarily undesirable. The RFA has commented as follows: "If particulars are shown and an analysis is made of only the determinations made for projects and programmes in the ensuing year, this will cover the particulars and an analysis of the amount and manner of funding determinations for all new projects and programmes starting in that financial year. Since the business plan is a rolling forward plan, once projects commence, which were in previous business plans shown to commence in following years, then these projects will also have their particulars shown and be analysed. And, for projects continuing from a previous year, the revised manner of funding in the ensuing year will be analysed. What would be the point of showing particulars of and analysing, in a BP for say 2004/05, projects set to commence only in 2008, and then again show all the particulars and analyse them in the BP for 2005/06, and again in the BP for 2006/07, etc., if they still remain set to commence in 2008? This would make the business plan very cumbersome. It should be sufficient to show, for projects commencing in following years, only an estimate of expenditure, rather than full particulars. (As an aside – so far, the RFA has in any event not shown any project or programme's full particulars in any business plan. We are still working on this, which will have to go in hand with a more formal method of funding determinations)." It needs to be remembered, however, that on a strict construction of paragraphs (a) and (b) of section 20(4), a determination of funding under paragraph (a) is to be followed up promptly with a determination about the allocation of funding under paragraph (b) that pertains to the ensuing year and the four financial years following immediately thereafter. When one considers the concluding part of paragraph (b), it seems that the allocation must at least be made before the commencement of the first financial year that follows upon the year in which the relevant paragraph (a) determination was made. If the RFA would rather prefer to have the power to postpone the manner of funding determinations till later years, it would be appropriate to amend the Act accordingly.

[119] See section 20(1).

analyses of factors affecting the implementation of a plan, a synthesis of funding determinations already made, and that it should contain:

(a) in respect of expenditures:

(i) the project, programme and administrative expenditure funding determinations under section 20(4) (after taking account of any moneys from other sources for any project or programme directly available to any approved authority);

(ii) the RFA's own administrative expenditure; and

(iii) (presumably – it is not stated in section 21(2)) other expenditures including compulsory expenditures e.g. in respect of loan repayments;

(iv) (presumably – it not stated in section 21(2)) any moneys to be deposited in a reserve fund established in terms of section 17(1)(k); and

(b) in respect of revenues:

(i) the estimated income from road user charges;

(ii) amounts of funding accruing to the RFA, the RA or an approved authority from any source other than the Road Fund;

(iii) (presumably – it not stated in section 21(2)) any moneys earned from investments made from the Fund;

(iv) (presumably – it not stated in section 21(2)) any moneys withdrawn from a reserve fund established in terms of section 17(1)(k); and

(v) (presumably – this is not stated in the Act) any money derived from loans disbursements;

(c) the proposed rates of road user charges;[120]

(d) an analysis, where appropriate, in respect of the above and of any factors which may affect the implementation of the plan and the measures to counter the effects of such factors; and

(e) particulars of any other matters required by the Minister.

If a business plan has not been "adopted" at the commencement of a financial year any utilisation of the moneys in the Road Fund by way of a distribution from the Road Fund to an approved authority is in fact *ultra vires* (section 17(4)). This has been the case during each of the RFA's first four years' of existence (in some instances due to unavoidable delays in obtaining loan guarantees). This suggests that some provision should be included in the Act

[120] The use of the word "proposed" implies a doubt whether the road user charges mentioned in a business plan are "approved" at the time of the adoption. This is something to be considered. Possibly section 18 of the Act should be amended as to the timing of changes in the rates of road user charges.

to sanction expenditure when there are delays in adopting a business plan.[121]

Although the Act does not define "adoption" (or approval) in relation to a business plan it is assumed that for an approved budget (or an amended budget) to become the official budget, all of the following procedural requirements must be complied with:

(a) the submission of budgets in accordance with all the provisions of section 20(1), (2) and (3) by approved authorities (timing, compliance with rules and principles,[122] particulars, consultation, etc.);

(b) evaluation of budgets on an individual project and programme basis, determination of "amount" of funding for each project and programme in accordance with section 19(2) rules and principles, i.e. the amount which is justified to be approved in terms of economic efficiency criteria (see section 20(4)(a));

(c) determination of the "manner" in which the amount of funding will actually be allocated after consideration of the available funding, other funding sources and effect on rates of road user charges (see section 20(4)(b)(i) to (iv));

(d) estimation of the revenue from road user charges, which would have to include a determination of the rates of road user charges in terms of section 18 of the Act;

(e) compilation of a draft business plan containing the particulars listed in section 21(2), (but in reality requiring some additional information as indicated above);

(f) consultation with such parties as the Minister of Finance, in consultation with the Minister responsible for transport, may determine (note that this consultation is concerned with the "extent to which the plan gives effect to the achievement of an economically efficient road"); and

(g) "adoption" (rather than approval) of the draft business plan by the Board of Directors at a meeting in which the "adoption" should be recorded in the minutes of the meeting. The term "adoption" (and not "approval") may be acceptable if it is interpreted as taking account of the fact that all determinations necessary for the synthesis of the business plan should already have been made as part of the requirements under section 18 and 20.

Section 21(6) of the Act requires that the RFA should publish the business plan in a format approved by the Minister in at least two newspapers circulating nation-wide. The RFA has, during the first three years after its establishment, not complied with this requirement. [123]

[121] Suitable provisions could probably be found in the State Finance Act. There should also be a legitimising provision in respect of unauthorised expenditure incurred during the first four years.

[122] Provided that such rules and principles have been framed by the RFA. In this regard it should be noted that, in the view of the Consultants, the reference in section 20(4)(a) to the consideration of rules and principles does not mean that any failure by the RFA to timeously frame the rules and principles pertaining to any function qualifying for funding from the Road Fund would constitute a reason to withhold funding from any approved authority. Where no rules and principles exist it would be reasonable for the RFA to consider budget submissions on the basis of any relevant motivation or in accordance with any principles agreed with an approved authority. In the case of the Roads Authority the latter's procedures agreement made provision for an interim funding rule regarded as essentially in accordance with the provisions of the RFA Act.

[123] The RFA has, however, confirmed that: "The business plan for 2003/04 was published as prescribed …

The following comments and proposals are made about the business plan:

(a) the Act's provisions with regard to the budgeting process, although apparently detailed, are open to criticism in that all possible revenue and expenditure items are not listed for inclusion in the plan and that the business plan is not explicitly required to be presented as a "balanced revenue and expenditure budget".[124] The RFA in fact follows the practice of presenting its business plans in the form of a "balanced revenue and expenditure budget" and consideration could be given to either amending the Act or promulgating regulations in terms of section 28 of the Act to ensure that this practice will be continued with in future;

(b) the sequence of the particulars listed in section 21(2) could be improved so that revenue and expenditure items are, respectively, grouped together;

(c) the Act should impose some obligation or procedure on the RFA to make a budget officially known to interested parties in some direct way (e.g. by means of an official letter). This would be in line with a policy of more direct communication with the RFA's stakeholders. In addition, it would ensure that there is no misunderstanding about the date on which a business plan is officially available, since this date also serves as the starting date[125] for the declaration of disputes in terms of the regulations under section 20(7) or the lodging of complaints in terms of the regulations under section 28(f);

(d) the business plan should make provision for the RFA's determinations under both paragraphs (a) and (b) of subsection 20(4)[126] to be shown - also when no expenditure is envisaged during the period of a business plan. This is necessary in order to make the distinction between a "refusal" to make a determination (section 20(7)(b)) and a determination, especially one which envisages implementation of the project or programme concerned at a date falling after the period of a business plan. The distinction is necessary for purposes of the disputes procedures; and

(e) the business plan should show -

(i) the income and expenditure totals in respect of the ensuing financial year and the following for years; and

(ii) the expenditure totals for approved projects which continue after the five year period of a business plan.

However, it was published in a form that the RFA regarded as appropriate, as the Minister has not made any determination about the form in which it should be published. Since it is the Minister's prerogative whether to make such a determination or not, it is foreseen that the RFA will continue to publish business plans in the format determined by the RFA, until such time that the Minister deems fit to make a different determination)." On the other hand, section 21(6) actually does say that the Minister must determine the form of publication. Strictly speaking, publication in any other form is not in accordance with the Act. Since publication is required from the RFA, it is submitted that there is a duty on the RFA to approach the Minister to make the relevant determination.

[124] The Road Safety Bill, 2003, see its clause 20, provides for such an approach.
[125] See the draft Disputes Regulations and Complaints regulations.
[126] See paragraph 5.6 of this Report.

The Act's provisions regarding the publication of a business plan (see section 21(6)) have to date not been complied with. One of the problems is that the business plan cannot be practically published with all its details – there are just too may details. The Act makes provision for the Minister to approve the form in which publication should take place. It is proposed that the present provisions with regard to the publication of the business plan be retained but that, if relevant regulations are to be promulgated, the format for the publication of the business plan also be prescribed by regulation.

6.3.3. Conclusions

It is concluded that the provisions of the Act:

(a) which deal with the preparation and adoption of the plan should be improved so that:

(i) the date of adoption, i.e. the date on which the business plan is officially approved, is defined (this could, but need not necessarily, be the date on which it is published in two newspapers circulating nation-wide – but see (iii) below);

(ii) an empowerment is provided to enable the RFA to set a time period during which disputes may be lodged in terms of section 20(7) (see discussion in section 6.8 hereafter);

(iii) more specific procedures are established in accordance with which approved authorities are (directly) officially informed by the RFA about the business plan and provided with details, at least such details that concern their own approved budgets and the conditions attached to their funding in terms of section 21(5);

(b) which deal with the content of the business plan should be improved to:

(i) require the details already included by the RFA in its business plan;

(ii) make provision for additional particulars as discussed herein and as required for purposes of section 20(4)(a) and (b) of the Act (taking account of any recommendations in the discussion in this Report on these sections);

(iii) include details of any "refusal to make a determination"; and

(iv) reflect all particulars that pertain to the ensuing financial year and such particulars relating to the four financial years following upon that year as may be relevant; and include particulars of any funding determinations under section 20(4)(a) and (b) which do not fall within the period of a business plan but which have nevertheless previously been approved *in principle* in terms of section 20(4)(a) or in terms of section 20(4)(b); and

(c) which deal with the publication of the business plan (section 21(6)) be reviewed after taking account of the extent to which amendments are made to the Act as a result of the conclusions in this Report.

6.3.4. Recommendation

It is recommended that the RFA consider the comments and proposals made above and advise as to the amendments to be made to the Act.

6.4. RFA's Performance Statement to the Minister of Finance

6.4.1. The issue

The purpose of the performance statement which the RFA must submit to the Minister in terms of section 22 of the Act is to enable the Minister to assess, *inter alia*, (see section 22(1)(a) to (h) for a complete list):

(a) the strategies of the RFA with regard to the funding requirements to be raised by way of road user charges;

(b) the types and rates of road user charges to be implemented;

(c) the policies to be followed in the borrowing of moneys; and

(d) the measures to be implemented to protect the liquidity of the Fund.

The issue is whether the provisions of the Act with regard to the performance statement are adequate to ensure that it achieves its purpose. In this regard cognizance should be taken of the role of the performance statement in the annual report to be submitted to the Minister.

6.4.2. Discussion

The performance statement is in the first instance a forward-looking instrument of control as opposed to, for instance, the annual financial statements ("to enable the Minister to assess"). However, in combination with the other reporting instruments it also has the potential to provide stakeholders with important information on actual performance.

Particularly important in the above regard is that the performance statement obliges the RFA to provide details, on the one hand, of the future funding requirements which are required to ensure the achievement of an economically efficient road sector and, on the other hand, the road user charges associated with such funding requirements. The future funding requirements referred to in section 22(1)(a)(i) should be interpreted as both the "economically efficient" or "optimum" funding requirements (section 20(4(a) of the Act) and the proposed actual funding which the RFA proposes to include in its business plan (section 20(4)(b)). By so doing the RFA will be better informing its stakeholders regarding the extent to which is achieving its mandate of ensuring an economically efficient road sector. The particulars included in a performance statement in terms of section 22(1)(a)(i), when compared with the funding amounts in a business plan, currently provide the only quantitative measure of the RFA's performance in achieving its statutory mandate. It is for the above reason that the RFA's annual report, see section 25(2)(b), is required to *"contain an assessment of the Administration's achievements in relation to its performance statement"*.

Such an assessment should evaluate the RFA's performance in managing the road user charging system in terms of:

(a) the amount of funding which should be provided;

(b) the actual funding provided (in accordance with the annual financial statements); and

(c) the rates of road users charges (the projected charges necessary for (a) above when compared with the actual charges implemented).

There are currently no other the statutorily required reporting obligations imposed on the RFA in terms of the Act which serve the purpose of accountability, see section 6.1 above, as well as those based on the performance statement, specifically as far as compliance with the RFA's basic mandate is concerned.

6.4.3. Conclusion

Depending on any conclusions and recommendations emanating from the discussion on the annual financial statements and annual report hereafter the conclusion herein is that the provisions of section 22 in respect of the performance statement are adequate for its purpose as stated earlier.

The performance statement, even more than the business plan, provides a basis for consulting with stakeholders, particularly the Minister of Finance and the Minister of Mines and Energy, about matters such as loan guarantees, the rates of road user charges, etc. (See the discussion about the power to impose fuel levies elsewhere in this Report.)

If any measures are regarded as necessary to ensure that the provisions of the Act relating to the performance statement come to their full right, appropriate regulations in terms of section 28 should be considered.

6.4.4. Recommendation

It is recommended that the RFA consider the discussion and conclusions above, in conjunction with other conclusions and recommendations in this Report and decide whether any further action should be taken, e.g. by way of amendments to the Act or regulations in terms of section 28 of the Act.

6.5. Accountability (financial reporting) of the RFA

6.5.1. The issue

For purposes of evaluating the RFA's management of the road user charging system and the Road Fund (see section 6.2 earlier), any interested party (including the RFA's own management and Board of Directors) is to a large extent dependent on the RFA's financial statements and annual report. Transparency and accountability go hand in hand and in accordance with the basic philosophies of the Road Sector Reform the RFA's financial statements and related reporting should enable adequate assessments to be made.

Section 24 of the Act ("accounting and auditing"), requires the accounting records of the RFA

to *"reflect fairly the state of affairs and business of the Administration and the Fund and to explain the transactions and financial condition of the Administration and the Fund*". The Act therefore requires that the accounts of the Road Fund and the RFA should be kept separately (see section 24(1)(a)).

The issue is whether the provisions of the Act are adequate to ensure that the state of affairs and the business of the Fund, taking account of the unique nature of the RFA's business, are indeed reflected fairly by conventional financial reporting practice such as currently employed and, if not, what should be done. One of the questions which has been posed by the Client is whether the Fund can be certified as a "going concern" when it is technically bankrupt.[127]

The issue of the legal persona and the accounting records of the Road Fund was rather extensively discussed in paragraph 6.2 of this Report and the discussion under this paragraph should therefore be read against that background.

6.5.2. Discussion

The Road Fund Administration's financial statements are not addressed herein, only that of the Road Fund.

The issue is therefore addressed by considering the following questions:

(a) what constitutes "the state of affairs and business of the Fund" given the RFA's unique circumstances (see discussion under section 6.2 of this Report);

(b) what information should be included in "accounting records" to be able to "reflect fairly" the state of affairs and business of the Fund; and

(c) do conventional financial statements as currently included in the annual report of the RFA contain the above information, thereby enabling the Minister and other interested parties to assess whether the RFA is successfully discharging its mandate?

The "financial condition" of the Road Fund is measured in terms of: (a) its short-term liquidity or ability to service its immediate cash flow requirements, and (b) its ability in the longer-term to meet its "funding obligations". The latter comprise, in the first instance, its "contractual commitments", e.g. in respect of loans repayments and in respect of ongoing road projects of the Road Authority which the RFA has approved for implementation in terms of its business plan.

However, the financial statements should also reflect the "business" of the RFA, namely the way in which it manages the road user charging system to raise sufficient revenue to ensure the achievement of a safe and economically efficient road sector. The RFA's financial obligations in the latter regard may be referred to as its "statutory obligations".

It would be possible to assess the Fund's short-term liquidity position by reference to its balance sheet, mainly current assets and liabilities. If this assessment is combined with an

[127] Again, any indication that the Fund can be in the position of a legal person and therefore go bankrupt must be read with the opinion of Prof G Erasmus on the issue of the Fund's legal personality that was received at a late stage and which has been reproduced in paragraph 6.2 above.

assessment of the Fund's income statement, and also the RFA's business plan, any interested party should be able to obtain sufficient information to draw a conclusion as to the Fund's ability to service short-term funding obligations.

An assessment of the Fund's longer-term financial position and the state of affairs of its business is more difficult because:

(a) any long-terms loan liabilities, e.g. to finance the construction of a new road, are not balanced by the "acquisition" of an asset, e.g. such as the road which has been constructed. This has resulted in the Fund showing a net equity position of minus N$130 million at the end of 2002/03 while an expected negative equity position of about N$400 million is expected for the year ending 2003/04. Such an equity position would normally reflect a very serious situation for a typical business enterprise. This is not necessarily the case for the Road Fund;

(b) the funding obligations related to approved ongoing road construction projects of the Roads Authority are not shown as liabilities;

(c) the longer-term funding requirements, which can possibly be referred to as "statutory obligations" and as to a large extent reflected in the Medium to Long Term Roads Master Plan of the Roads Authority (MLTRMP), which are necessary to achieve an economically efficient road sector are not reflected in the financial statements (but should be available in the RFA's business plan in medium-term format and in its performance statement in longer-term format (see section 22(1)(a) of the Act));

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(d) the expected future revenue of the Road Fund from road user charges and other sources are not shown in the financial statements; and

(e) the ratios and relationships between future "statutory funding obligations", contractual funding obligations and future revenue projections are not shown in the financial statements.

Stakeholders such as the Minister of Finance, the Minister responsible for transport, the Minister of Mines and Energy, the Roads Authority, other approved authorities, potential financing agencies and road users are therefore not necessarily placed in a position to assess whether the RFA is achieving its mandate to ensure a safe and economically efficient road sector and whether it has implemented sound policies in respect of the loan funding obligations it has taken on. In other words, it is questionable whether the present format of the RFA's accounting records "*reflect fairly the state of affairs and business of the Fund*" and "*explain the transactions and financial condition of the Fund*".

With regard to the RFA's performance statement it should be noted that it is a "forward-looking" control instrument while financial statements reflect the actual performance after the end of a financial year (therefore "backward-looking"). It is for this reason that the Act (see section 25(1)(b) of the Act) requires the annual report of the RFA to include an *"assessment by the Administration of its achievements in relation to its performance statement"*.

In assessing the "business" of the RFA (which is what its financial statements are about) the first question is whether or not an economically road sector has been achieved, alternatively, whether progress is being made in that regard. To answer this question the RFA, in the first

instance, needs to provide a generally acceptable definition for the concept of an "economically efficient road sector".[128] In the second instance, it needs to determine the cost-effective level of funding, on a real, stable, long-term basis, which is required to achieve an "economically efficient" road sector. It is only once the above have determined by the RFA that it is in a position compare the current funding level with the economically efficient funding level and to draw any conclusions as to whether or not the RFA is achieving its mandate. It is therefore obvious that conclusions about the RFA's "business" performance cannot be taken on the basis of just the current revenue and expenditure levels. In a shorter-term context there may be variations between annual direct revenue (road user charges) and expenditure which can be explained, e.g. elimination of road maintenance or rehabilitation backlogs which require additional expenditure over and above the longer-term stable expenditure level. If these are financed through loans a longer-term view of the Road Fund's financial position is necessary to inform stakeholders whether or not the RFA is on course to achieve its mandate. If the expenditure is too low, because of revenue constraints, a variation may again be explained by way of projected increases in the rates of road user charges indicating that strategies are in place to achieve the RFA's mandate.

The issue here is thus not only the RFA's financial position *per se*, but its "business" or its progress in achieving its mandate. If the RFA's business were to make a profit for its shareholders, the financial statements comprising a balance sheet, an income statement and a cash flow statement would in general be adequate. However, we note that even for purely profit-making entities these are not always adequate. "Financial analysis" is required. Financial analysts use a number of techniques e.g. ratio analyses to evaluate an entity's performance and financial position. These techniques are tailored to the needs of the specific stakeholder (creditor, investor, management, etc.). It is submitted that a similar approach to the RFA's financial reporting should be considered.

From a financial or fiduciary point of view (since the RFA acts as "trustee" of road user revenues), liquidity and solvency issues must be answered. It is submitted that in this regard, also, taking into account the RFA's unique business and the constraints in using conventional asset valuation, the RFA should consider presenting some additional information in its financial statements and annual report.

6.5.3. Conclusion

While the Act does not place any limitations on the information which the RFA may include in its business plan in respect of the above matters (see for instance section 21(2) of the Act which refers to analyses which the RFA should include) or on the information which the Minister may require the RFA to include in a business plan or its annual report, the current financial reporting format of the RFA, based on conventional accounting practice as it is, undoubtedly does not adequately reflect the "business" and "state of affairs" of the Road Fund.

As has been shown above, conventional financial statements could show the Road Fund to be in a serious negative net equity position, which would normally create serious concerns for creditors, while this would not necessarily be the case in respect of the Road Fund.

[128] See, however, what was said in connection with such a definition in paragraph 5.5. A specified definition for the above purposes may be necessary for the purpose of "assessing" the RFA's business.

Similarly, the RFA's "business" could be in serious jeopardy in the sense that, although it is in a sound financial position in terms of conventional accounting practice, it is failing by a wide margin in being able to achieve an economically efficient road sector.

Important stakeholders are therefore not adequately informed about the RFA's performance and this means that effect is not being given to the road sector reform's principle with regard to "accountability".

On a strict interpretation it may be argued that the RFA is not in compliance with its legislation if it continues with its current financial reporting practices.

Part of the problem could be that auditors and accountants are wary of departing from conventional accounting practice as required in terms of GAAP.

It is therefore necessary for one or more of the following to be done:

(a) The RFA itself decides to implement more appropriate financial reporting practices (using the provisions of the section 24(1)(a) of the Act) and instructs its auditors accordingly;

(b) the RFA advises the Minister to promulgate regulations in terms of section 28 of the Act (either under paragraph (e) or paragraph (g) thereof) which should explicitly specify the financial reporting format and information to be presented in the RFA's financial statements and annual report;

(c) amend the Act.

6.5.4. Recommendation

It is recommended that the RFA take note of the conclusions reached above, also in paragraph 6.2 earlier in this Report, and advise whether further action is required from the Consultants.

6.6. The RFA's Annual report

6.6.1. The issue

The Act requires the RFA's annual report to, *inter alia*, contain:

(a) particulars of the projects and programmes relating to the management of the road user charging system (on a strict interpretation these would be "managerial projects and programmes" of the RFA itself rather than road projects and programmes funded by the RFA); and

(b) an assessment by the RFA's of its achievements in relation to its performance statement.

In tabling the annual report in Parliament the Minister must include the RFA's audited financial statements, business plan and performance statement. For all practical purposes the RFA's annual transparency and accountability obligations should be seen as being met by the public availability of the above documents, i.e. the RFA's annual report.

The issue is whether the above obligations are being served by the annual report and, if not, what should be done.

6.6.2. Discussion

Apart from the two requirements mentioned above, the usefulness of the RFA's annual report in informing stakeholders is to a large dependent on the information contained in its financial statements, its business plan and its performance statement.

The latter documents have been discussed herein and, depending on the extent to which the conclusions reached about them are acted upon, it may not be necessary to delve too deeply into the Act's requirements with regard to the annual report.

For many stakeholders the RFA's own "assessment of its achievements in relation to its performance statement" would form or should form the focus of the annual report. The role of the performance statement has been discussed elsewhere in this Report and if the proposals made in that discussion are acted upon the annual report's assessment, with suitable references to the business plan and financial statements should provide more than adequate disclosure to stakeholders regarding the RFA's performance.

6.6.3. Conclusion

The provisions of the Act with regard to the annual report are adequate but the success of the annual report depends to a large extent on the various other documents which accompany it. These have been discussed elsewhere and, if action is taken as proposed, no further action need be taken with regard to the Act's provisions relating to the annual report.

6.6.4. Recommendation

It is recommended that note be taken of the conclusion above and attention be given to the various proposals made in this Report in order to decide whether any amendments to the Act are required in respect of its provisions with regard to the annual report.

6.7. Legislative requirements regarding consultation with stakeholders

6.7.1. The issue

The Act has numerous provisions for consultation, generally "*with such parties or after compliance with such consultation procedures as determined by the Minister*" or with the Roads Authority and other approved authorities. Consultation is usually statutorily prescribed whenever the RFA takes any important decisions such as to determine the amounts of funding to be provided in respect of projects and programmes, when road user charges are set, when rules and principles are "framed" and when the limiting determinations in terms of section 17(2) are being made.

The issue is whether these provisions are adequate, too onerous or whether they need to be adjusted to ensure a more pro-active approach to the issue of stakeholder participation, e.g. to create a statutorily prescribed mechanism for the participation of road users.

6.7.2. Discussion

The RFA's obligations for consultation with the Minister are not discussed herein, nor are the consultation requirements imposed on the Minister, e.g. to consult with the Minister responsible for transport when appointing the members of the Board of Directors of the RFA. The focus herein is on the consultation requirements when the following actions occur:

(a) the RFA determines the "types and maximum amounts of expenditure which may be incurred in terms of various paragraphs under section17(1)" (section 17(2) of the Act);

(b) the RFA imposes road user charges (section 18(1)). In this instance the parties to be consulted must be made known by notice in the *Gazette* by the Minister;

(c) the RFA frames the rules and principles for the submission of budgets (section 20(2)) and the evaluation of projects and programmes in terms of section 20(4)(a) (section 19(2));

(d) the RFA makes its section 20(4) "amount of funding determinations" and its section 20(4)(b) "manner of funding determinations";

(e) the RFA finalises its business plan or any amendment of the business plan - in this instance the Minister must consult with the Minister responsible for transport - (section 21(5)), noting that the consultations shall be "*concerning the extent to which the plan gives effect to the achievement of an economically efficient road sector*"; and

(f) the RFA prepares its draft performance statement (section 22(1)).

It is noted that section 20(3) of the Act empowers the Minister responsible for transport (rather than the Minister of Finance) to determine the parties to be consulted by the Roads Authority and other approved authorities, in preparing and submitting their budgets. This is a discretionary and not a mandatory obligation. It makes sense that the Minister responsible for transport should prescribe the parties to be consulted by the Roads Authority, but it can be questioned whether the said Minister should also determine the parties to be consulted by all other approved authorities. This is something to be considered by the RFA.

A point to be noted is that the consultations under (e) above are required by the Act to focus on the "*extent to which the business plan complies with the achievement of an economically efficient road sector*". This would suggest that the parties to be consulted should be selected with a specific purpose in mind and would not necessarily comprise parties who will receive funding allocations from the Road Fund.

The above consultation requirements all empower the RFA to make its various determinations "after" consultation with the parties concerned, i.e. the autonomy of the RFA is not compromised.

It is concluded that the Act's provisions with regard to consultation:

(a) Are in accordance with the policies of the Road Sector Reform;

(b) are possibly somewhat onerous in as much as that they require a determination by the Minister and in one instances a notice on the *Gazette*;

(c) with the exception of the Roads Authority and approved authorities, do not provide for a mandatory consultation procedure with identified parties[129] such as road users and also not for a mechanism to set up bodies which could represent road users or any other body of interested parties not represented through some or other statutory or non-statutory body;

(d) require the Minister responsible for transport, rather than finance, to determine the parties to be consulted in the preparation of budgets; and

(e) do not guarantee rights to consultation for parties who have obvious *locus standi*, where such parties have not been approved by the Minister.

The main point of possible criticism against the present consultation provisions of the Act is therefore possibly that they do not in so many words empower the RFA to itself decide about the parties it should consult. To facilitate such consultations the RFA should be empowered to exercise its own discretion as to whom it should involve in consultations while at the same time retaining the power of the Minister to make determinations regarding the parties to be consulted.

It is a policy decision whether the Act should go so far as to oblige either the RFA or the Minister to be responsible to set up or create any bodies to represent, for instance, the general road user. The RFA could give consideration to this matter if it feels that its future public relations policy, for instance, would benefit if it could be addressed to specific stakeholder groups and in this way create a capability for two-way dialogue. There are deeply entrenched perceptions about road use costs, so-called perceptions about the "affordability" or "acceptability" or road user charges, and these can ultimately best be addressed if the corps of road users is well-informed through, *inter alia*, public relations programmes.

The general conclusion in this Report is that the Act's provisions for consultation are comprehensive and that, apart from the considerations mentioned, no amendments need be considered.

6.7.3. Policy aspects

The Act's consultation requirements are in accordance with the general "transparency" and participation policies of the Road Sector Reform.

In accordance with the principle that the RFA is an independent regulator of funding (see the definition of the road user charging system in section 1 of the Act) and makes its determinations on the basis of technical expertise rather than by way of representative

[129] The Ministry of Mines and Energy is regarded as a party who should possibly have statutorily entrenched rights to consultation about the levels of road user fuel levies. Although the Minister of Finance would normally ensure that the Minister of Mines and Energy is on the list of parties to be consulted it would confirm the latter Minister's rights in this regard if the Act specifically addressed the matter. See, however, paragraph 3.1 of this Report.

majority voting procedures, the "after" consultation provision that appears in most consultation provisions is a legal necessity and should not be removed.[130]

6.7.4. Recommendation

It is recommended that the RFA consider the possibilities to amend the Act which have been mentioned and advise accordingly.

6.8. Dispute and complaints regulations

6.8.1. The issues

Section 20(7) to (9) of the RFA Act sets out the basic provisions of a dispute resolution mechanism relating to disputes arising out of determinations made by the RFA under section 20(4)(a) (which pertains to the funding of the type of expenditure contemplated in section 17(1)(a)) and refusals to make such determinations. Section 20(8), in particular, empowers the Minister responsible for finance to make regulations on the appointment and establishment of a panel of experts for dealing with such disputes. The issues that arose in connection with the dispute mechanism provisions are whether –

(a) they serve the need for effective dispute resolution;

(b) the enabling regulatory powers of the Minister are wide enough to cover all matters with regard to which regulations are necessary to be made, in particular whether:

  (i) the Act indicates what the dispute adjudicating panel's powers are with regard to the enforceability of its findings or recommendations (taking account of policy in this regard);

  (ii) there is sufficient clarity about "a determination" and a "refusal to make a determination" referred to in section 20(7). (Should the latter be interpreted as a "rejection" of a proposed project or programme or a determination of an amount less than requested by an approved authority?);

  (iii) the regulations may provide for a time limit within which a complaint must be lodged (something which is necessary to avoid a situation where a dispute against the approval of a particular project is successful but the project or programme has already been commenced or completed); and

  (iv) the concept of a "date of a determination or refusal" needs attention in the Act itself in view of the concern under (iii) above.

In terms of section 28(f) of the RFA Act the Minister may make certain regulations regarding the procedures to be followed in the lodging of complaints against the RFA but excluding disputes under section 20(7). A number of issues regarding section 28(f) have arisen:

[130] This also explains why the provisions with regard to the complaints procedures, for instance (see next paragraph), should not open the door for any decisions of the RFA to be overturned. An exception is the review of section 20(4)(a) "amount of funding determinations" by an independent panel of experts as contemplated in section 20(7) to (9).

(a) Should regulations under section 28(f) open all matters pertaining to the RFA's more important administrative decisions to the complaints procedure? (If nothing is said, it may be possible for the Minister to include, by virtue of his purely discretionary power to make regulations, only a limited range of complaints in future complaints regulations.);

(b) whether the Act should, in view of the RFA's presumed autonomy and expertise with regard to funding matters, explicitly state that the findings or recommendations following from the prescribed complaints procedure are not binding on the RFA; and

(c) whether specific provision could or should be made in the Act that complaints about financial or funding allocations, not falling within the ambit of the disputes regulations, could, at the Minister's discretion, be referred to any panel established in terms of section 20(7)?

Apart from these, certain further issues arose in connection with both the disputes and complaints mechanisms during the Working Meeting held between the Client and the Consultants on 6 to 8 May 2004 at Cape Town and in consequence of the views expressed by Prof G Erasmus of the University of Stellenbosch Law Faculty in response to questions referred to him. These are set out below.

In the Client's Guidance Document in response to the issues set out by the Consultants in their Inception Report, the Client remarked that attending to these issues in detail would go beyond the scope of the TOR for Part A of the RUCS Review. The Consultants should therefore limit their work on these issues to a brief synopsis of findings and opinions with regard to these, which would allow the RFA to assess the need in future to address these issues separately on merit. In the course of addressing these issues and following the deliberations during the Working Meeting, it became apparent that there were in fact more matters which needed attention and for that reason the discussion herein will extend somewhat beyond the limits set out in the Guidance Document. It was also apparent that the Disputes Regulations and the Complaints Regulations have areas in common and that it would be worthwhile to look at both under one heading. In this regard the fact that the new draft Complaints Regulations provide for complaints to dealt with by the same panel established in terms of the provisions for dealing with disputes in terms of section 20(7) of the Act plays a not insignificant role.

6.8.2. Discussion

6.8.2.1 Policy background to the Disputes and Complaints Regulations

The "disputes" regulations and the "complaints" regulations were included in the Act for entirely different policy reasons. It is worthwhile revisiting these because the legal issues can, in the final analysis, only be resolved on the basis of a clear understanding of the policies upon which the road user charging system and the RFA Act are based. It is also apparent that these policies will need, with the advantage of hindsight, to be reviewed in greater detail, than was the case when the Act was drafted. It may also be deduced from the indications given by the Client at Working Meeting mentioned above that certain further policy principles to be provided for in the Act had in fact been identified.

The provisions in section 20(7) to (9) of the Act for resolving disputes have as objective to ensure that the RFA, on the hand will exercise its considerable powers to determine funding and set the rates of road user charges in strict accordance with the principles of the Act, and, on the other hand, to protect the RFA from external pressures to provide funding for projects and programmes which do not meet economic efficiency criteria. It is for these reasons that the Act specifically provides for the adjudication of disputes by an expert, independent panel, and by way of a special mandatory provision in the Act that are separate from the general regulations provisions in section 28(f). The matters which may be referred for dispute are, further, limited to section 20(4)(a) "amount of funding" determinations applicable to the management of the national road network (i.e. funding to be provided to the Roads Authority under section 17(1)(a) of the Act). Evidently disputes will always have to be declared in respect of specific, identified road projects or programmes.

The provision for complaints regulations in section 28(f) is part of the general empowering provisions for regulations in the Act. These regulations are promulgated at the discretion of the Minister of Finance in consultation with the Minister responsible for transport. The objective of these regulations was to promote the general transparency and accountability principles underpinning the Act. The only specific limitation with regard to the complaints provision is that it excludes the disputes contemplated under section 20(7) of the Act.

With regard to the disputes regulations section 20(7) of the RFA Act provides that:

> *"(7) The Minister shall, within three months after the commencement of this Act, make regulations in relation to the adjudication of disputes arising out of-*
>
> *(a) any determination made by the Administration in terms of subsection (4)(a) in respect of any type of expenditure contemplated in section 17(l)(a); or*
>
> *(b) any refusal of the Administration to make a determination referred to in paragraph (a).*
>
> *(8) Without prejudice to the generality of the power conferred by subsection (7), regulations made thereunder shall in particular provide for-*
>
> *(a) the constitution of an independent panel of experts to adjudicate disputes contemplated in that subsection;*
>
> *(b) the qualifications and conditions of appointment of the members of the panel;*
>
> *(c) the powers and duties of the panel; and*
>
> *(d) the procedures to be followed-*
>
> *(i) by the complainant concerned in the submission of a dispute; and*
>
> *(ii) by the panel in the adjudication of disputes.*
>
> *(9) Regulations made under subsection (7) shall require that any adjudication of a dispute made under those regulations shall state the extent to which any determination referred to in paragraph (a) of that subsection or any refusal referred to in paragraph*

(b) of that subsection gives effect to section 19(l) and the rules and principles contemplated in section 19(2), including the extent to which such rule or principle concerned as such gives effect to section 19(1)."

Regarding the complaints regulations section 28 of the RFA Act states:

"28. The Minister, in consultation with the Minister responsible for Transport, and after consultation with the Administration, may make regulations in relation to -

(f) the procedures to be followed in connection with the lodging of complaints against the Administration which do not relate to disputes contemplated in subsection (7) of section 20; and".

6.8.2.2 Opinion provided by Prof Erasmus on section 20(7) to (9) (Disputes)

We reproduce below the opinion provided by Prof Erasmus in response to certain questions referred to him by the Consultants. These are apparent from the text of the opinion.

"ADJUDICATION IN TERMS OF SECTION 20(7) OF THE RFA ACT

1 The question to be addressed here reads as follows: "Does `adjudication` in section 20(7) tell us that the orders of the Adjudication Panel should be enforceable?" If the answer is negative, clarity will have to be included in the Act. The intention is that orders by the Panel should be "enforceable".

2 Section 20(7) alone does not give an indication of a power on the new (still to be established) Panel to take binding and enforceable decisions concerning disputes. One will have to read the other subsequent provisions such as section 20(8) as well. Even the latter provision is qualified in the sense that the establishment of the Panel depends on regulations still to be issued by the Minister.

3 It would add considerably to clarity and certainty if the provision in the Act gives an indication of the nature of this power of the Panel. The normal approach to the use of regulations is to establish the basic principles and powers in the main Act and then to provide for the detail and technical matters in the subsequent regulations. Regulations are subordinate law that can only be *intra vires* to the extent that they are clearly linked to an empowering provision in the Act. The limits set by the main statutory provision have to be respected. In this instance the regulations will actually be the main source of legislation for determining the extent of the Panel's powers. It is suggested that the matter is clarified by adding something in the Act itself with respect to the real intention of the legislature. It is further suggested that the Act states that the decisions/rulings of the Panel shall be binding. But then it will also be more elegant drafting to provide for the establishment of the Panel as such in the Act itself. All the remaining matters such as the qualification of the panellists, the procedures to be adopted and the formalities applicable to the applications to the Panel can then be dealt with in the regulations.

4 Section 20(8)(c) provides for the powers and duties of the Panel to be enacted through subsequent regulations by the Minister. This is a broad provision and does not contain any indications as to the extent of such powers and duties. It would have been better to provide for the establishment of the Panel in the Act and to make it clear that it is

established for the purpose of deciding a particular category of disputes. The Act should then contain clear guidance as to what the regulations should contain. The only powers and duties that the Panel have are those foreseen by the Act.

5 It has been indicated that there is some unhappiness with respect to the use of the word "adjudicate" in relation to the functions of the Panel, because the term "adjudication" is associated with the judicial process. (Black's *Law Dictionary* for example states that adjudicates means: "to rule upon judicially", "to settle in the exercise of judicial authority", "to determine finally". The *Oxford Dictionary* speaks of: "award judicially".) In the present instance it will obviously not be a court of law which will exercise this power. (Recourse to the courts will in any case remain possible through the working of the law of the land and the Constitution of Namibia.) By using the term "adjudication" the procedure before the Panel is perhaps given a solemn, court-like description. The Panel is, however, not a court of law. It is a statutory body with the specific function to resolve certain disputes emanating from the implementation of the RFA Act. And it forms an integral part of the dispensation brought about by this Act. Whenever there are questions as to the nature and powers of the Panel, the answers are in principle to be found in the Act. For this reason it is necessary to provide sufficient clarity in the Act. The real intention of the Legislature is to be obtained from reading the Act as a whole and in context; not by focussing on one word in isolation.

6 The availability of a body that can deal with specific types of disputes as foreseen in the Act could be quite advantageous. Through its decisions the clarity, certainty and predictability of the whole procedure can be enhanced. The RFA itself will have to take notice of all decisions by the Panel and will adhere to the practice as it is developed. This is the impression that the regulations also create. The Panel is a unique creature of statute. If there is sufficient clarity in the Act itself as to what it is to be and what powers it enjoys, then the regulations can give effect to that objective.

7 Suggestion: The finality of decisions by the Panel should be provided for in the Act; as well as the fact of its establishment.

8 Section 20 (7) provides that the Minister shall "make regulations in relation to the adjudication of disputes" arising out of **determinations** made by the RFA as contemplated in Section 17(1) (a) and **refusals** to make determinations. It would have been more logical to indicate right here in the Act who will adjudicate such disputes (the Panel), and not to mention the future creation of the Panel (via regulations) only later. It would also have been structurally neater and clearer if the aspect of the adjudication of disputes had been dealt with in a separate provision and under its own heading. The matter is sufficiently important and distinct in nature. Unfortunately it now appears in a part of the Act dealing with "Funding of Roads Authority and approved authorities."

9 Section 20(7) provides for two types of disputes only:

- regarding the determination of amounts of funding for approved road projects; and
- where applications for project funding are refused.

If the intention of section 20(7) is to require the Panel to go further, e.g. to amend a determination (i.e. the amount which has been determined by the RFA) or to reverse a

refusal to make a determination (which is assumed to be a zero funding determination by the RFA), the Act should be appropriately amended to provide greater clarity.

10 In section 20(9) the substance and content of the Ministerial regulations dealing with disputes are explained. It actually tells us how the Panel shall deal with disputes. The formulation is not exactly elegant. It provides that adjudications "shall state" how the RFA's disputed determinations or refusals give effect to the requirements of section 19(1); that is basically how the economic efficiency principle has been implemented. It would have made more sense to make this a function of the Panel; adjudications cannot state anything. The Panel states or speaks when it "decides" a dispute. Adjudication is actually the process in which the Panel is involved when dealing with a dispute.

11 The Panel must also; when adjudicating, state "the extent to which such rule or principle concerned as such gives effect to section 19(1)". This implies that the Panel has the power to revisit the rules and principles "contemplated" in section 19(2). What exactly this entails is not clear. The Panel cannot declare these rules and principles invalid. (My instructions on this point were inconclusive.) It simply does not have that power. The powers of the Panel should all be listed expressly and together in the same provision. That provision is section 20(7); it mentions only 2 types of disputes, namely determinations and refusals by the RFA. The extent to which a rule or principle gives effect to section 19(1) is not a matter that can give rise to a dispute. That possibility is not mentioned in section 20(7).

12 If the objective is that the Panel should have a role in ensuring that the rules and principles contemplated in section 19(2) are adequate, then it will be far better to let it scrutinise the draft rules and principles before they are finalised. It may even be provided for reviewing the rules and principles from time to time to ensure that they reflect modern developments. This function can also be entrusted to the Panel. In this manner the Panel will play a more integrated role within the whole system.

13 Although not part of my instructions, I would like to draw attention to the formulation of section 19(2). The rules and principles seem to be quite important in certain instances when they shall be followed by the Roads Authority and approved authorities. This creates the impression that they will form part of the general law applicable to the very system created by the Act. But their legal status is uncertain. In other instances they apparently can be considered to be only guidelines. There is no provision for their enactment in any form. To "frame" something does not amount to enactment and does not lead to a binding legal instrument. It should also be pointed out that the RFA is not a law making body. If the rules and principles (why 2 different categories?) are really to be binding (as the intention seems to be) and be more than mere guidelines, then they must be enacted; e.g. by promulgating them in the Gazette. This matter requires clarification."[131]

We will refer to the issues arising from the above opinion in our conclusions below.

6.8.2.3 Cape Town Working Meeting (6 to 8 May 2004)

During the Cape Town Working Meeting held from 6 to 8 May 2004, the Client indicated

[131] See paragraph 6.8.3(f).

that:

(a) the scope of section 20 (7) must be broadened to also include disputes emanating from section 20(4)(a) determinations of services and functions contemplated in section 17(1)(c) to (n) of the RFA Act. Although disputes of this kind are in fact covered by the wide provisions of the newly drafted Complaints Regulations (see section 28(f)), it was felt that these types of disputes would systematically fit in better under section 20(7) to (9) of the Act. It is foreseen that the procedure that will be followed, etc. will be the same as in the case of section 17(1)(a) disputes and that the matter should in any event be heard by a panel of experts,[132] except that the finding of the panel should not be binding on the RFA;

(b) it should be said in so many words that no complaints emanating from section 20(4)(b) will be entertained under the complaints procedures contemplated in section 28(f);

(c) the panel of experts should first refer their opinion to the RFA for comment before the panel's finding is made final;

(d) the Act should affirm that the dispute and complaints procedures should first be exhausted before any aggrieved party approaches a court.

6.8.3. Conclusions and recommendations

The Consultants have already exceeded their brief from the Client in addressing the matter of disputes and complaints regulations. We will therefore limit ourselves to the following general conclusions:

(a) all points made during the Cape Town Working Meeting are supported;

(b) both the disputes and complaints provisions in the Act should clearly indicate the binding nature (or not) of a finding. In the case of the dispute adjudication procedure, the panel's finding should be binding except where this procedure is extended to section 17(1)(c) to (n) type disputes. The exact way in which the panel's finding is to be enforceable should receive further consideration (e.g. should the panel be able to provide more funding than the RFA deems fit; can the panel make its own funding determination, etc.). As regards the complaints procedures, the Minister should not be able to compel the RFA to take any action specified by him/her;

(c) the wording of paragraphs (a) and (b) of section 20(7) complicates matters. It should be rather obvious that one can either get a determination which confirms the calculations made by the party applying for funding, (in which case there is no dispute), or another figure that will either be for a lesser amount or a zero, and in which case the applicant may wish to take the matter further. It is therefore not necessary to refer to a refusal to make a determination – all that need to be said is merely that a procedure is being provided in respect of disputes arising out of a section 20(4)(a) determination;

(d) the procedures and complaints procedures provisions should be extended and framed in

[132] Incidentally, the draft Complaints Regulations also provides that the panel of experts should handle the procedures.

separate sections of the Act so as to improve their position in the framework of the Act. (It needs to be remarked that the fact that the present section 28(f) only refers to "procedures" in connection with complaints and not to all other aspects of the complaints mechanism (e.g. the party who will investigate them, his/her its powers, etc.) is a shortcoming.);

(e) the Act itself should contain provisions on the establishment of the panel. It should spell out whether the panel should be constituted on a permanent basis or not. The functions of the dispute panel must be clearly formulated and include the power to declare rules and principles that do not conform to section 19(1) void. The RFA should also be able to request advisory opinions from the panel;

(f) a policy decision should be taken on the nature of the rules and principles. If they are considered legally enforceable, they should rather have been regulations. However, a less formalistic view is that they are similar to the State Finance Act's Treasury Instructions, and that the main objections against the current wording of section 19(2) could be removed by providing for a publication procedure or for provisions whereby the rules and principles will be kept for public inspection during normal hours;

(g) provision should be made for a time limit within which disputes an complaints may be lodged. The Act should also explain what date the "date of a determination or a refusal" should be for these purposes;[133]

(h) the promulgation of the new draft Dispute Regulations and Complaints Regulations should be held in abeyance till finality is reached on all issues discussed in this paragraph; and

(i) generally, it was felt that the legislative provisions serve the needs in respect of both disputes and complaints.

7. OTHER EXTERNAL ISSUES

7.1. Client's instructions in this regard

The Client's instructions with regard to this heading in the Guidance Document were:

"The RFA has taken note of the Consultants' comments regarding the:

- Road Safety Bill, 2003; and
- Borrowing of monies and dependence of the RFA on Government guarantees,

but regards further attention to these issues by the Consultants as falling outside the scope of the RUCS Review."

[133] See the proposal in paragraph 6.3.2 above.

7.2. Road Safety Bill, 2003

This was not dealt with as per request of the Client in the Guidance Document. We have retained the heading for purposes of record.

7.3. Borrowing of moneys and dependence of RFA on Government Guarantees

This was not dealt with as per request of the Client in the Guidance Document. We have retained the heading for purposes of record.

8. LEGAL ISSUES INVOLVING THE ROADS AUTHORITY ACT

8.1. Introduction

The Client's instructions with regard to this heading were: "With regard to these, the Consultants should limit their work to a brief discussion of issues involved, which would allow the RFA to make an assessment whether and to what extent it should address these issues with the RA in future consultations."

We are of the view that certain provisions of the RA Act have implications for the RFA Act and have therefore briefly addressed the issues below.

8.2. Roads Authority Act – functions performed by the RA and funded by the RFA in terms of sections 15(1)(c) and 16(1)(f) of the RA Act (transitional provisions)

8.2.1. The issue

The question is whether both sections 15 and 16 of the RA Act open the door for the RA to contract or to be assigned functions additional to its basic mandate of managing the national road network.

Sections 15 and 16 differ therein that section 15(1)(c) provides for "*advice and assistance on such conditions as may be agreed upon*" while section 16(1)(f) empowers the Minister responsible for transport to "assign" functions to the RA, *inter alia* functions regarding "*any purpose relating to road traffic or road transportation*". Section 15(1)(c) implies that the RA may negotiate as a party in its own right before "contracting" to provide any services in terms of an advice and assistance provision. On the other hand, the conferment of a function on the RA by way of an "assignment" under section 16(1)(f) is mandatory, i.e. the service must be provided by the RA. In addition, it will broaden the scope of RA's "road management function" with implications for the RFA's funding function.[134]

The question is whether the above provisions of the RA Act should be revisited to, on the one hand, better enable the RFA to fulfil its funding regulatory and funding provision functions, and, on the other hand, more clearly distinguish between the RA's basic "agency" role of managing the national road network (see the RA's objective in section 3 of the RA Act) and other "authority" type functions (related to road traffic and transportation) which it may be

[134] When the RA performs a "road management function" it is funded under paragraph (a) of section 17(1) of the RFA Act.

better able to provide in an effective manner than a Government institution.[135]

We believe that the delays in finalising the so-called "section 111 Agreement" between the RA and the Minister responsible for transport (the RFA was initially seen as a third party to the agreement) can in part be ascribed to the problems with the above provisions of the RA Act.

8.2.2. Discussion

Section 15(1)(c) of the RA Act provides that:

> ***"15.*** *(1) Subject to this Act, the functions of the Authority are to –*
>
> *(c) advise and assist the Minister or an approved authority, as defined in section 1 of the Road Fund Administration Act, on such conditions as may be agreed upon, or any other person, subject to the approval of the Minister and on such conditions as the Minister may determine, in regard to -*
>
> *(i) any matter relating to the planning, design, construction and maintenance of roads, whether such roads are part of the national road network or not; or*
>
> *(ii) the exercise of any power or the performance of any duty which the Minister or any such approved authority or such person may or is required to exercise or perform under this Act or any other law."*

Our main concern with section 15(1)(c) is that the words "advise and assist" do not clearly indicate that the RA is empowered to undertake the performance of full functions. These words in themselves suggest an "advisory" or "assisting" role in the sense that a service (function) of limited extent is to be provided. The fact that the provision of assistance or advice is a "function" of the RA (cf. the introductory sentence in section 15(1)) rather than an "empowerment" to contract to undertake the performance of certain substantial functions is also significant. Subparagraph (ii) of section 15(1)(c) further reinforces this idea by referring to advice and assistance in relation to: "*… the performance of any duty which the Minister … may or is required to perform under this Act or any other law*". There is no indication that the Minister may transfer or assign the performance of his or her functions to the RA (as is the case in section 16(1)(f) - see hereafter); only that he or she may be "advised" or "assisted" in (continuing) performing his or her function. This indicates that the RA is not supposed to take over the function as such. It is our view that if the intention of the Legislator had been to empower the RA to "contract" with the Minister for the performance of any duty or function of the Minister, a proper "empowering" provision should rather have been provided in the RA Act.[136]

However, we believe that there was, and still is, a requirement for the RA to be empowered to undertake circumscribed functions on behalf of the Minister (e.g. functions relating to the planning, design, construction and maintenance of roads and the regulation of road traffic or road transportation). In this regard one merely has to take note of functions already being

[135] In this regard see also the provisions of the SADC Protocol on Transport, Communications and Meteorology.
[136] See also the reasoning towards the end of this paragraph.

undertaken by the RA in addition to managing the national road network. [137]

In our view section 15(1)(c) should be retained as it is, as a "function" of the RA, since the RA should typically be obliged (i.e. it is one of the RA's obligatory statutory functions) to advise and assist the Minister with regard to the relevant fields of expertise mentioned in subparagraph (i). It must be clear, however, that the powers conferred by that section should merely be restricted to advice and, for the purposes of such advice, such assistance as may be necessary in connection with the advisory function. There is, however, a need for a specific additional authority that empowers the RA to undertake work in connection with roads infrastructure, road traffic and road transportation on a contract basis. It is suggested that this authority be contained in a new subsection to section 16 that should be inserted just after section 16(1). That would place it systematically in a better position and avoid any further confusion about the real intention of section 15(1)(c). In addition the new subsection should spell out that when the RA contracts for the performance of functions or the exercise of powers, it shall be compensated for doing so by the party with which it enters into the agreement, further, that no such agreement shall create any obligation on the RFA to provide funding except in as much as that the party contracting with the RA shall have qualified for funding from the Road Fund, or the function concerned qualifies for funding from the Road Fund in terms of section 17 of the RFA Act.

It is necessary that section 16(1)(f) be reconsidered. The Transport Minister should not use his/her power in terms of that provision to "task" the RA with the performance of functions that the RFA is then statutorily obliged to fund from the Road Fund. Section 16(4) provides an example of a power whereby the Transport Minister may instruct the RA to undertake certain work but then subject to the provision of State funding.

Further reasons why section 15(1)(c) should not be seen as an authority to extend the RA's functions as such are:

(a) The basic rule of interpretation that an Act must be read as a whole.[138] It is submitted that when one reads sections 15 and 16, and considers the structure and systematic position of the latter, it should become clear that section 16 is the point where the crucial functions of the RA is spelt out. If section 15 could be construed as an "carte blanche" to extend the functions of the RA merely by way of concluding agreements with different parties who are in need of particular services, it would basically undermine the effect and purpose of section 16(1);

(b) According to the definition of "administrative expenditure" in section 1(1) of the RFA Act, it includes the cost "*of advisory services required by the Minister or the Minister responsible for Transport in the performance of his or her functions under this Act or the Roads Authority Act*". This underlying suggestion, i.e. that "advisory services" is not considered as the object of a full-scale project or programme, but could merely be dealt with within the scope of administrative expenditure, points to the assumption that these services are not concerned with full-scale RA services.

[137] See the so-called "section 111 Agreement" which is still in draft form, but defines these functions in some detail.

[138] The words "subject to the provisions of this Act" that appear in the introductory sentence of section 15(1), is also a reminder to read interpret the Act in a holistic manner.

Turning now to section 16 of the RA Act. Subsections (1) and (2) of this section, respectively, provide:

"16. *(1) Notwithstanding anything to the contrary contained in any other law, but subject to this Act and with due regard to the funds at its disposal, the Authority shall undertake the management of the national road network, including –*

(a) the planning, designing, construction and maintenance of roads which are part of the national road network;

(b) the quality control of materials required for the proper construction and maintenance of roads;

(c) the supervision of work contracted out in terms of subsection (2);

(d) the operation of road management systems;

(e) subject to any other law, the prevention of the excessive damaging of roads by road users or any other parties; and

(f) the performance of any other function assigned to it by or under any law, or by the Minister by notice in the Gazette, which is necessary in order to achieve the objectives of this Act or for any purpose relating to road traffic or road transportation.

(2) Subject to subsection (3), the Authority may -

(a) enter into an agreement with any person, body or authority to perform any act or provide any service for or on behalf of the Authority in respect of any matter related to the functions of the Authority; and

(b) in writing delegate any of its powers, including any delegated power, to the person, body or authority referred to in paragraph (a) if the Authority considers it necessary for the efficient performance of any such act or the provision of any such service."

Our main problems with paragraph (f) above is that it is so written that any function "assigned" to the RA by the Minister (provided it complies with the requirements that it is necessary to achieve the objects of the Act or relates to any purpose relating to road traffic or transportation): (a) must be accepted by the RA, (b) by definition becomes a part of the function of managing the national road network (typically planning, designing, constructing and maintaining roads), and (c) creates a funding burden on the RFA, since the funding of the management of the national road network is, in terms of section 17(1)(a) of the RFA Act, a funding responsibility of the RFA.

In our view it is undesirable to "mix", by way of an "enforced" definition, operational functions concerning infrastructure provision, with regulatory functions related to road traffic and transport. The RFA Act, in section 17(1), clearly separates the funding of traffic regulatory functions from the function of funding the management of the national road network. With the RFA Act's present provisions the Minister has little option but to use his

or her "assigning" power under section 16(1)(f) in order to make use of the RA to perform certain functions with the concomitant implications for the road management function and the funding thereof by the RFA. Section 16((1)(f) of the RA Act should therefore only be used if the Minister wishes to use his or her "assigning powers" for purposes of empowering the RA to perform a specific function rather than to "pass on" the responsibility for the performance of a function, moreover also funding responsibilities (to the RFA). Section 16(1) of the RA Act should be seen as dealing exclusively with the "infrastructure" function. If the proposal above to amend section 15 of the RA Act is accepted it will resolve most of the uncertainties or concerns which currently exist and also clearly indicate how agreements between the Minister and the RA, both as far as the actual performance of the relevant function are concerned and as regards the funding aspects, should be dealt with. Section 16(1)(f) should then only be amended to the extent that it should restrict "assignments" to such duties or functions which relate to the management of the national road network as defined in section 16(1)(1) to (e).

8.2.3. Conclusion and recommendation

It is recommended that the RFA should further investigate the present issues within the context of the above discussion and, depending on the outcome, approach the RA and the Minister responsible for transport with a view to seeking the amendment of sections 15 and 16 of the RA Act.

In particular, it is recommended that –

(a) section 15(1)(c) should make it clear that it deals with a "function" of the RA and that the RA's role is confined to "advice" and "assistance" and that it does not go beyond that;

(b) a new subsection should be inserted in section 15 which "empowers" the RFA to enter into agreements with the Minister or any other party for the performance of functions related to road traffic or road transportation and in which the funding responsibilities, in consultation with the RFA, should be spelt out; and

(c) section 16(1)(f) should be amended to only allow for the "assignment" of functions related to the achievement of the objects of the Act, specifically those related to the management of the national road network.

8.3. Section 16(5) of the RA Act

8.3.1. The issue

Does the present wording of section 16(5) create confusion as to whether paragraphs (a), (b) and (c) relate to the minimum standards and measures for the management of roads or the minimum standards for the maintenance of roads?

8.3.2. Discussion

Section 16(5) of the RA Act provides as follows:

"(5) The Minister may prescribe minimum standards and measures for the management of the roads comprising the national road network, and minimum standards for the maintenance of such road network which are reasonably required to -

(a) achieve a safe road system;

(b) ensure compliance with the international obligations of the State; or

(c) cause the least possible disruption of the environment, but subject to the provisions of any other law."

It must be noted that, according to section 16(1), "the management" of roads includes the planning, designing, construction and maintenance of roads (see paragraph (a) of that section). The wording of section 16(5) creates the impression that the Legislator may have intended to distinguish between "management" and "maintenance" of the national road network in prescribing the "minimum standards *and measures*" for "management" on the one hand, and the "minimum standards" for "maintenance", on the other hand. In other words that the original intention was that section 16(5) should discern between "minimum standards and measures" which apply to the "management" of the national road network and "minimum standards" which apply only to the "maintenance" part of the management of the national road network. Thus, if the further interpretation is that the expression "which are reasonably required" applies only to the "minimum standards for maintenance", it could be deduced that the minimum standards and measures for the first-mentioned functions (planning, designing and construction) were intended not to be limited by that expression. If the above was a correct interpretation, the Minister should therefore be able to prescribe planning, designing and construction standards without the "reasonably required" restriction. However, in both cases the prescribed minimum *standards and measures* or *standards*, as the case may be, refer to the objectives mentioned in paragraphs (a) (a safe road system), (b) (compliance with international obligations) and (c) (the least possible disruption of the environment).[139] Furthermore, it is not absolutely clear whether the objectives mentioned in paragraphs (a) (a safe road system), (b) (compliance with international obligations) and (c) (the least possible disruption of the environment) only pertain to the "maintenance" *standards* or also to the ("management") minimum *standards and measures.*

In our view it is not necessarily clear, nor logical, that the Legislator intended to waive the

[139] Apparently there was a concern during the drafting process that the Act was inadequate to ensure that the maintenance of "social" roads, after their initial construction under section 16(4), would qualify, due to strict "economic efficiency" principles (the construction of these roads did not originally qualify to be fully funded from the Road Fund), to receive "full" funding in respect of maintenance. A deliberate policy decision was taken that, notwithstanding that the *maintenance* of such roads should possibly also not be funded to the full extent from the Road Fund in terms of strict "economic efficiency" criteria, they should nevertheless subsequently (i.e. after construction) be *fully maintained* by the Road Fund (the reasoning was that it would unduly complicate future funding responsibilities and also be politically unpopular if maintenance was not taken over by the Fund). The way in which this was to be achieved was to require compliance with "minimum maintenance standards" prescribed by the Transport Minister. The question is thus whether the provisions of the RA Act and the RFA Act give effect to the above policy decision. To address fears that the Minister may use section 16(5) to force the RFA to provide funding for "social roads" by prescribing excessive standards for existing "tracks" (which would in effect require them to be "built up" from a low standard) or roads constructed under section 16(4) the words "which are reasonably required" are used in the text of section 16(5). These standards were also confined to those that pertain to the three objectives in paragraphs (a), (b) and (c) of section 16(5).

requirement "which are reasonably required" in the case of management of the national road network. It is also not clear what the difference is, or should be, between "minimum standards" and "minimum standards *and measures*".

We again take note of the original policy intention that the RFA should be obliged to provide funding to the RA to enable it to fully maintain "social" roads contemplated in section 16(4) of the RA Act even if these roads were initially constructed under that section with funding not necessarily fully provided by the RFA. In addition, we are of the opinion that the aim of section 16(5) was to ensure that Namibia's national road network complied with the objectives under paragraphs (a), (b) and (c) of section 16(5) of the RA Act. In our view the expression "which are reasonably required" should refer to all management standards and measures and maintenance standards prescribed under section 16(5) and, since these are "minimum" standards and measures or standards, they must be complied with. We believe that the current wording of section 16(5) is possibly confusing and that there may be reason to revisit this section and amend section 16(5) so that it clearly gives effect to the policies of Government with regard to compliance with the standards for the planning, design, construction and maintenance of the national road network related to the objectives under paragraph (a), (b) and (c) of section 16(5). We are also of the view that such standards should more appropriately be prescribed under a future Roads Act (currently the Roads Ordinance, 1972) and that the RA should be required to comply with such standards as part of the delegation of powers under section 25 of the RA Act.

As far as the RFA's role in providing funding to ensure compliance with prescribed minimum road standards is concerned, we note that according to section 19(1)(a)(ii), the RFA must, in determining the funding amount of roads projects and programmes, ensure that funding is sufficient to ensure compliance by the RA with the minimum standards and measures prescribed under section 16(5) of the RA Act.[140] We believe that this is a basic policy principle, namely that minimum safety standards should be maintained as a first priority in providing funding. If this is correct, it means that in providing funding for the management of the national road network, it could be argued that compliance with this principle may even supersede compliance with the economic efficiency principle where the amount of funding required to comply with the minimum safety standards exceeds that which can be justified by applying the economic efficiency principle.[141]

8.3.3. Conclusion and recommendation

It is recommended that the RFA consider the discussion above and confirm the basic policy principles relevant to the RFA's role in providing funding for the management of the national road network. Depending on the confirmation received, section 16(5) of the RA Act and possibly section 19(1)(a)(ii) of the RFA Act should be amended to clearly convey the policy principles.

[140] See the discussion of section 19(1)(a)(ii) provision in paragraphs 5.2 and 5.5.
[141] See paragraph 5.6.2.

8.4. Section 27(10): Transitional provisions pertaining to the RCC

8.4.1. The issue

The RA Act provides for the preferential treatment by the RA of the RCC in the award of road construction and maintenance work during the first three years after the "transfer date". The intention of the Legislator was that the RCC should become fully competitive during the above-mentioned period after which it should be able to compete freely with other commercially managed companies for road construction and maintenance work. The RA and the RCC have concluded an agreement (Memorandum of Understanding) by which the above period has in effect been extended.

Can the RA perpetuate the protection of the Roads Contractor Company in respect of contract work?

8.4.2. Discussion

Section 27(10) of the RA Act provides that:

"(10) The Authority shall -

(a) before the transfer date defined in section 1 of the Roads Contractor Company Act, 1999, entrust to the Department of Transport all work relating to the construction and maintenance of roads, to the extent that such work was executed by that department before that date; and

(b) during the first period of three years after the transfer date contemplated in paragraph (a), entrust to the company referred to in section 2 of that Act, all work contemplated in that paragraph,

except if the Authority and the Department or the company, as the case may be, with the approval of the Minister in a particular case, agree otherwise."

The following information concerning the new arrangements between the RCC and the RA was disclosed in a draft report on the Road Sector Reform.[142]

"Since the RCC's transitional period expired on 31 March 2003 and the RCC had clearly not become commercially competitive it became necessary to put in place further formal arrangements between the RCC and the Roads Authority for an extension of the transitional period.

The RCC has entered into an Executive Arrangement (formalised by way of a Memorandum of Understanding) with the Roads Authority which will last for a three year period. In terms of the agreement the RCC will receive road maintenance contracts from the Roads Authority for each of the three financial years following the 2002/03 financial year for an amount not exceeding nor materially below N$237 million, but excluding value-added tax. The RCC is required to ensure an annual reduction in its unit costs and prices while maintaining

[142] See reference no. 18 in Annexure B.

satisfactory service levels, thus reflecting annually improving competitiveness. The agreement provides that regular meetings be held between the senior management and boards of the RCC and the Roads Authority to review progress with the implementation of the Executive Arrangement.".

The transitional provisions (section 27 of the RA Act), *inter alia*, require the RA to entrust certain work to the RCC during the first period of three years after the transfer date. Since this period has elapsed and the time may not yet be ripe to expose the Company to full competition, this provision may have to be amended. The answer to this question is of course, purely a matter of policy. (It has been reported though, that the RA and the RCC have entered into a "Memorandum of Understanding" to deal with the way in which the RA will during the period following the above-mentioned three-year period award work to the RCC.)

In the absence of a legislative amendment that affords further protection to the RCC, there is nothing in the RA Act that specifically empowers the RA to extend further preferential treatment to the RCC. However, from the formulation of section 16(3) of the RA Act, namely:

> *"(3) Subject to section 27(10), the Authority shall not itself undertake any work for the construction or maintenance of any road but shall cause such work to be done by any outside contractor with whom the Authority has entered into a contract for the purpose."*

it is clear that the RA has the capacity to contract with any party. The proviso, "subject to competitive bidding conditions" is not included in section 16(3). In addition, section 17(1)(c) of the RA Act, i.e. that part of the procedures agreement dealing with the awarding of contracts and negotiating of agreements also does not specifically require confirmation that "competitive" bidding conditions shall prevail. It is possible that the new "Competition Act" or the economic efficiency principle of the RFA Act could be invoked by the RFA if it is of the view that the arrangement between the RA and the RCC will result in "inefficient" use of resources. However, this matter was not further investigated within the scope of this Report.

We have not identified further issues emanating from the transitional provisions.

8.4.3. Conclusion and recommendation

The above issue is a policy matter and no specific recommendation is made.

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ANNEXURE A: LEGAL OPINION RE FUEL LEVY

LEGAL OPINION

1. Introduction

JB Consult was requested by the Road Fund Administration to provide it with a legal opinion as to whether the Ministry of Mines and Energy is empowered in terms of any legislation to refuse to increase the petrol price as a result of the imposition of a fuel levy as a road user charge.

The Road Fund Administration has, under section 18(1) of the Road Fund Administration Act, 1999 (Act No. 18 of 1999), imposed a road user charge, which is to be collected as a fuel levy.

It must be noted that the fuel levy is used as a charging instrument and that this levy is not per se a fuel tax, but a manner of recovering cost from a road user.

The relevant legislation regulating the imposition of the road user charge-fuel levy and the determination of the "pump fuel price" are the Road Fund Administration Act, 1999 and the Petroleum Products and Energy Act, 1990 (Act No.13 of 1990) In the interpretation of these Acts, the purposes of the Acts must be taken into account.

2. The Petroleum Products and Energy Act, 1990

2.1 Long Title

The purpose of the Petroleum Products and Energy Act, 1990 is given in its long title as follows:

"To provide for measures for the saving of petroleum products and an economy in the cost of distribution thereof, and for the maintenance of a price therefor; for control of the furnishing of certain information regarding petroleum products; and for the rendering of services of a particular standard, in connection with motor vehicles; for the establishment of the National Energy Fund and for the utilization thereof; for the establishment of the National Energy Council and the functions thereof; for the imposition of levies on fuel; and to provide for matters incidental thereto."-

The words *"and for the maintenance of a price therefor"* are of particular importance in interpreting this Act. The word "maintain" is defined by the Collins Dictionary as "to continue or retain"; "keep in existence", "keep in proper or good condition" or "to enable a person to support a style of living". None of these definitions particularly explain a policy for the determination of the fuel price. The latter may, however, apply to the Act in the sense that a fuel price has to be determined with the purpose in mind to enable the Government to maintain the National Energy Fund to enable it to meet its financial obligations.

Section 2

Section 2(c) of the Act provides for the determination of the fuel price. It states that the Minister **may** *"prescribe the price, or a maximum or minimum price, at which petroleum products may be sold or determine that such products may be sold without any restriction being applicable in relation to the selling price thereof:"* This section regulates five scenarios:

- The determination of a specific fuel price
- The determination of a maximum fuel price

- The determination of a minimum fuel price
- The determination of a maximum and a minimum fuel price
- The total deregulation of the fuel price.

It is clear that the policy with regard to the determination of the fuel price is in a transitional phase and that provision is made for that transition by careful steering of the process by regulation. It is also interesting to note that, in contrast to paragraphs (a) and (b) of section 2, paragraph (c), which is the paragraph under discussion, does not mention the purpose of the determination of the fuel price. The White Paper on Energy Policy, 1998, however, casts some light on the matter. The Government in par 3.4.4.1 of the White Paper, adopted the following policy: *"Government, in collaboration with stakeholders, will gradually move towards a more deregulated market, but price deregulation will only occur when the conditions necessary for establishing a competitive market are achieved."* (These conditions are quoted by the White Paper to relate to the market size, the barriers to entry and the balance of the market powers between different industry participants.) It seems as if the amendment of section 2(c) of the petroleum Products Act, 1999, provides for the deregulation process of the petroleum price.

2.3 Section 19 – Imposition of the fuel levy

Section 19 of the Petroleum Products and Energy Act, 1990 determines that the Minister of Mines and Energy may, with the concurrence o the Minister of Finance, impose a levy on any type of fuel sold or distributed by an undertaking at any point in Namibia, or imported by a person into Namibia. The funds collected in terms of this section are to be paid into the NEF and utilized as prescribed in section 11 of the same Act. Section 11 is mainly concerned with various payments in connection with fuel and research in connection with fuel. The section, however, contains a "catch-all" phrase, which enables the utilization of the Fund for any other purpose that the Minister, with the approval of the Minister of Finance, may direct or approve. The utilization of the Fund in connection with the maintaining and development of the transport infrastructure obviously falls under the "catch-all" provision.
It must be noted that the Minister of Finance must in terms of section 19 and section 11 of the Petroleum Products and Energy Act, 1990, have either the Minister of Finance's consent or his or her agreement on the fuel levy to be imposed or the application of the Fund with regard to transport infrastructure.

3. The Road Fund Administration Act, 1999

3.1 Purpose of the Act

Although the long title in the case of the Road Fund Administration Act, 1999 (the RFA Act) does not indicate the policy behind the Act, section 3 thereof clearly indicates the object of the Road Fund Administration. The section states: " *Subject to this Act, the object of the Administration is to manage the road user charging system in such a manner as to secure and allocate sufficient funding for the payment of expenditure as contemplated in section 17(1), with a view to achieving a safe and economically efficient road sector."* Section 17, in turn, provides for the utilization of the Road Fund. The purposes for which the Fund may be utilized are mainly related to the development and maintenance of roads, road traffic law enforcement, the maintenance of a road traffic information system, road safety and administration. In short, it could therefore be said that the purpose of the RFA Act is to

manage a road user charging system. In order to do so, it is empowered to impose road user charges, of which a fuel levy is but one. A Fund is established and regulated for these purposes.

3.2 Imposition of a Fuel Levy by the RFA

Section 18 (1)(d) of the RFA Act enables the RFA to impose a petrol and diesel levy on every litre of petrol or diesel sold by any undertaking in Namibia. In terms of section 18(1)(f), the notice imposing the levy must also indicate the refund of an amount paid in respect of fuel sold for purposes "other than on-road "use. In this regard it is important to point out that a road user charge is levelled at the person who makes use of the roads infrastructure and the charge is imposed in terms of a "user pay" policy, which is widely accepted in modern government and has also been accepted by the National Assembly with the promulgation of this Act. The reason why the user charge is collected as a petrol/diesel levy is merely because this is the cheapest and most practical manner in which to recover costs from road users.

In line with the policy that only a road **user** charge may be imposed, Government Notice No. 95 of 2000, dated 1 April 2000, authorises refunds with regard to fuel sold for purposes other than on-road use of a vehicle.

3.3 Inclusion of road user charge in the fuel price.

Section 18(1)(d) describes the fuel levy to be imposed and determines that the levy ***'is to be included"*** in any determination of the selling price of petrol and diesel, as the case may be, under any law relating to petroleum products.". The words seem to be drafted according to the new rules of plain language. In terms of those rules, the word "shall", (which previously always indicated that the provision was mandatory) may not be used in a provisional sentence, or in relation to an object (thing). (Maine Legislative Drafting Manual, Part III C) The sentence in question is drafted in the future progressive tense, which is used to indicate that after the levies have been imposed, the inclusion into the determination of the fuel price will **be in progress**. As this is a statement of fact, the language used can only be interpreted to be mandatory and will entail that the Minister of Mines and Energy will be obliged to include the road user charge in the determination of the fuel price. This section must, however, be read in conjunction with section 2(c) of the Petroleum Products and Energy Act, which determines that the Minister of Mines and Energy may determine the petrol price, as set out in paragraph 2.2 of this document. A problem may arise in the fact that the Minister of Mines and Energy may impose a maximum and a minimum price for fuel, or both a maximum and a minimum price. If that Minister acts in terms of that empowerment, the result may be that the real cost with regard to road usage cannot be recovered by means of a fuel levy and that other more expensive means of cost recovery must be investigated. However, the process of deregulation of the petrol price has not yet reached the stage where the determination of maximum or minimum prices had to be determined, and the Minister of Mines and Energy is still determining a fixed petrol price based on the basic supply cost, user levies and revenue taxes.

4. Policy Considerations and Legal Vehicles

Paragraph 3.4.4.3 of the White Paper on Energy Policy states the following: *"Government revenues from liquid fuels must be sufficient to cover transport infrastructure needs as well as providing a source of income for the fiscus. These objectives must be balanced with the need*

for reasonably priced liquid fuels…Certain levies within the broad tax on liquid fuels may be dedicated to the use of roads and to subsidise prices in rural areas."

The Petroleum Products and Energy Act, 1990, the Road Fund Administration Act, 1999, the Motor Vehicle Accident Fund Act, 1990, the Customs and Excise Act, 1998 and the Road Traffic Safety Act, 1972, give effect to the policy quoted above. These laws all impose a levy on fuel. They constitute the legal vehicles for the implementation of an integrated fuel pricing policy for Namibia (Cabinet Decision No. 37/11.12.96/003). The fuel price consists of a basic supply cost, user levies and revenue taxes. The fuel levy in terms of the RFA Act constitutes the user charge component of the fuel price. It could therefore be contended that the Minister of Mines and Energy must include the Road User Charge –fuel levy in the determination of the petrol price. This depends of course on the manner in which both the Minister of Mines and Energy and the Road Fund Administration performed the functions given to them by the two Acts.

5. Exercise of Discretion

The exercise of functions by a Minister or a body established by statute is subject to the laws giving the function and the rules of the administrative law read with the Constitution. The determination of the fuel price in terms of section 2 of the Petroleum Products and Energy Act, 1990, is such an administrative Act. Over and above the fact that the Minister of Mines and Energy is in terms of article 41 of the Constitution of the Republic of Namibia individually accountable to the President and Parliament for the exercise of his functions, he is also bound in terms of section 18 of the Constitution to *"act fairly and reasonably and comply with the requirements imposed upon such bodies and officials by common law and any relevant legislation…."*. The common law requires inter alia that an administrative action must comply with the following:

- *"The requirements relating to the qualifications and attributes for the administrative organ and the scope and nature of the organ's statutory authority;*
- *The statutory and common law rules relating to the form and procedure for the administrative act;*
- *The rules of natural justice;*
- *The rules relating to the purpose of the act, in other words, that the action must serve an authorised purpose; and*
- *The rule relating to the consequence of the action, in other words, reasonable administrative action."* (`Burns "Administrative Law under the 1996 Constitution", p. 126).

Neither the Minister of Mines and Energy nor the RFA may ignore the above principles. Furthermore, *"all administrative actions must serve the general interest– this is the general principle behind all administrative activity"* (ibid, p.123). It follows that it could not serve the general purpose if the parties in question act in isolation (without consulting each other on matters that clearly influence each other), or act in its own interest alone without taking the general interest into account.

In the exercise of its discretion, the RFA had to take into account the principles laid down in the RFA Act, especially in section 19 thereof. The section determines the principles to be taken into account in determining the amount of funding. These principles have been taken in to account in the determination of the levels of the fuel levy. (The RUCNAM document).

6. Conclusion

In view of the above, it can be concluded that-

- The Petroleum Products and Energy Act, 1992 and the RFA Act do not contradict each other on the question of the determination of the fuel price;(The Petroleum Products and Energy Act, 1990, regulate a fuel tax, while the RFA Act regulates a road user charge. The method of a fuel levy is used only because the administration of the levy is relatively inexpensive);
- In terms of section 18(1)(d) of the RFA Act, it is mandatory for the Minister of Mines and Energy to include the fuel levy imposed in terms of that Act in the fuel price;
- The common law and the Constitution requires both parties to exercise their functions justly and reasonably in accordance with the principles set out in paragraph 5. The effect would be that the Minister of Mines and Energy can at the most indicate to the RFA (or the Minister of Finance as responsible Minister) that he/she is of the opinion that the Minister of Finance or the RFA did not exercise his/her/its functions correctly in terms of the provisions of the Constitution.

7. Recommendation

It is recommended that –

- In the interest of good governance the Minister of Mines and Energy, as the Minister responsible for the determination of the fuel price, be timeously informed of any amendment of the fuel price necessitated by the imposition or increase of the fuel levy in terms of the RFA Act.
- That the RFA ensures that it can substantiate any imposition or increase of the fuel levy under the RFA Act in terms of the principles set out in par 5 of this document and section 18(3) and 19 of the RFA Act.

ANNEXURE B : REFERENCES

1. Road Fund Administration Act, 1999 (Act No. 18 of 1999).
2. Roads Authority Act, 1999 (Act No. 17 of 1999).
3. Road Traffic and Transport Act, 1999 (Act No. 22 of 1999).
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5. Report of the Interministerial Committee of Technical Experts on the Proposed System of Road User Charges. Ministry of Works, Transport and Communication, 22 August 1994.
6. Draft Road Safety Bill 2003. Ministry of Works, Transport and Communication.
7. Petroleum Products and Energy Act, 1990 (Act No. 13 of 1990).
8. Draft Issues Paper on the Funding Responsibility for the Performance of Road Traffic Regulatory Functions in terms of the Road Fund Administration Act and the Road Traffic and Transport Act, 19 March 2003.
9. Draft Rules and Principles Pertaining to Traffic Law Enforcement and Adjudication (version dated 09/05/2003).
10. Final Draft: Memorandum: Road Sector Reform in Namibia. Volume 1: Background, Policies and Structures. Department of Transport, Ministry of Works, Transport and Communication. 7 March 2000.
11. Draft Performance Statement of the RFA (2003).
12. Procedures Agreement between the RFA and the Roads Authority. (First Agreement, 2000-2002.)
13. Road Sector Reform Review (11 November 2001). Report by Prof. I Heggie (Review Moderator) (MSWord File: "Heggie - Namibia Road Sector Reform Review - III.doc dated 17/01/2002).
14. Report on Road User Charging System Study Tour to Australia and New Zealand. RFA. September 2002.
15. Legal Opinion as to whether the Ministry of Mines and Energy is empowered in terms of any legislation to refuse to increase the petrol price as a result of the imposition of a fuel levy as a road user charge. JB Consult.
16. Report on Progress with regard to Various Matters during period 1st January 2001 to 31st October 2002, 28 November 2002. Prepared by Consultancy Wim Ravenscroft for the RFA.
17. Megaprojects and Risk – An Anatomy of Ambition. Bent Flyvbjerg, Nils Bruzelius and Werner Rothengatter. Cambridge University Press, 2003.
18. Road Sector Reform: Draft report. February 2004. Ministry of Works, Transport and Communication.

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ANNEXURE C : FORMAT FOR BUSINESS PLAN TO ACCOMMODATE PROPOSED SECTION 20 AMENDMENTS

	Section of the Act	Approved in principle (s 20(4)(a))	Previous years (ongoing)	Business Plan Total (s 20(4)(b))	Year					Future years
					2004	2005	2006	2007	2008	
Management of the national road network	17(1)(a)	6,265.00	400.00	2,865.00	540.00	555.00	570.00	590.00	610.00	3,000.00
Administrative Expenditure of the RFA	17(1)(b)	70.00	0.00	70.00	12.00	13.00	14.00	15.00	16.00	0.00
Local Authorities - Urban arterials	17(1)(c)(i)	45.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	45.00
Local Authorities - Road maintenance	17(1)(c)(ii)	100.00	0.00	100.00	18.00	19.00	20.00	21.00	22.00	0.00
Traffic information systems (NATIS)	17(1)(d)	85.00	0.00	85.00	15.00	16.00	17.00	18.00	19.00	0.00
Traffic law enforcement/overloading control	17(1)(e)	80.00	0.00	80.00	14.00	15.00	16.00	17.00	18.00	0.00
Vehicle testing and driving testing	17(1)(f)	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Road research studies	17(1)(g)	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Road Safety Agency	17(1)(h)	35.00	0.00	35.00	5.00	6.00	7.00	8.00	9.00	0.00
Loan interest payments (sec. 29(2) loans)	17(1)(i)	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Loan / bond interest payments	17(1)(j)	800.00	0.00	362.00	39.00	65.00	87.00	92.00	79.00	438.00
Claims for compensation	17(1)(l)	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Insurance against claims for damage	17(1)(m)	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Any other expenditure approved	17(1)(n)	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Totals		7,480.00	400.00	3,597.00	643.00	689.00	731.00	761.00	773.00	3,483.00
Examples										
Project A	17(1)(a)	150.00	0.00	150.00	50.00	50.00	50.00	0.00	0.00	0.00
Project B	17(1)(a)	150.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	150.00
Project C	17(1)(a)	150.00	0.00	100.00				50.00	50.00	50.00
Project D	17(1)(a)	150.00	50.00	100.00	50.00	50.00	0.00	0.00	0.00	0.00
Project E	17(1)(a)	0.00	0.00	0.00	0	0	0	0	0	0