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GOVERNMENT NOTICES • GOEWERMENTSKENNISGEWINGS

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DEPARTMENT OF TRANSPORT

NO. 1135

24 OCTOBER 2018

**PUBLICATION OF THE ECONOMIC REGULATION OF TRANSPORT BILL,  
2018**

**FOR PUBLIC COMMENTS**

The draft Economic Regulation of Transport Bill, 2018 was published in Government Gazette No.41437, Notice No. 632 of 12 February 2018 for public comments. The draft Bill was subsequently revised pursuant to the public comments. The revised draft Economic Regulation of Transport Bill is hereby published for further public comments.

Any interested persons are requested to submit written comments on the draft Economic Regulation of Transport Bill, 2018 within 30 days from the date of publication of this Notice in the Government Gazette.

All comments should be directed to the Director-General, Department of Transport for attention of Mr Moeketsi Sikhudo at:

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Or by hand delivery to Reception, Ground Floor, Forum Building, 159 Struben Street, Pretoria, 0002

**DEPARTMENT OF TRANSPORT**

**ECONOMIC REGULATION OF TRANSPORT BILL, 2018**

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*(As introduced in the National Assembly (proposed Section 76); explanatory summary of the Bill published in Government Gazette No. 41992 of 24 October 2018)*

*(The English text is the official text of the Bill)*

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**(MINISTER OF TRANSPORT)**

**[B-2018]**

## **BILL**

**To consolidate the economic regulation of transport within a single framework and policy, to establish the Transport Economic Regulator, to establish the Transport Economic Council, to make consequential amendments to various other Acts, and to provide for related incidental matters.**

**BE IT ENACTED by the Parliament of the Republic of South Africa, as follows: -**

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**MEMORANDUM ON THE OBJECTS OF THE ECONOMIC REGULATION OF  
TRANSPORT BILL**

## Chapter 1—Interpretation, Purpose and Application

### Part A - Interpretation

#### 1. Definitions

In this Act—

“**access**” means the use of an infrastructure, facility or a resource to provide goods or services to customers;

“**access agreement**” means an agreement contemplated in Section 5, between an access seeker and an infrastructure or resource owner, setting out the terms and conditions for access by an access seeker to the infrastructure, resource or facility of an infrastructure or resource owner;

“**Air Traffic and Navigation Services Company**” means the Air Traffic and Navigation Services Company Limited established in terms of the Air Traffic and Navigation Services Company Act, 1993 (Act No. 45 of 1993);

“**Airports Company of South Africa**” means the Airports Company Limited established in terms of the Airports Company Act, 1993 (Act No. 44 of 1993);

“**annual fee**” means a fee paid by each regulated entity to fund the activities of the Regulator and the Council, as determined in terms of Section 49(2);

“**Board**” means the governing body of the Transport Economic Regulator established by Section 28;

“**Cabinet**” means the body of the national executive described in Section 91 of the Constitution;

“**Chief Executive Officer**” means the person holding the office of Chief Executive Officer of the Regulator, in terms of Section 33 and 34;

“**Competition Act**” means the Competition Act, 1998 (Act No. 89 of 1998);

“**complainant**” means a person who has submitted a complaint to the Regulator in terms of Section 13;

“**confidential information**” means trade, business or industrial information that belongs to a person, firm or the state, has a particular economic value, and is not generally available to or known by others;

“**Constitution**” means the Constitution of the Republic of South Africa, 1996;

“**Council**” means the Transport Economic Council, established by Section 44;

“**economic regulation**” means the regulation of facilities or services within the transport sector —

- (a) by determining the price control for access to facilities or for services;
- (b) of access to facilities or services; and
- (c) of service levels and service conditions;

“**effective date**” means the date that this Act came into operation in terms of Section 72;

“**electronic communication**” has the meaning set out in Section 1 of the Electronic Communications and Transactions Act, 2002 (Act No. 25 of 2002);

“**essential facility**” means a facility or resource that cannot reasonably be duplicated, and without access to which competitors cannot reasonably provide goods or services to their customers;

“**Executive Administrative Committee**” means the executive structure of the Regulator constituted in terms of Section 32(5);

“**Executive Regulatory Panel**” means the executive structure of the Regulator constituted in terms of Section 32(4);

“**facility**” means any physical infrastructure used for the transportation of persons or goods within the transport sector;

“**inspector**” means a person who has been appointed as an inspector in terms of Section 53(1);

“**inter-related**” has the meaning set out in Section 1 of the Companies Act, 2008 (Act No. 71 of 2008);

“**market**” means any system, institution, procedure, social relationship, infrastructure or process by or through which the price of any goods or services are determined or established;

“**market inquiry**” has the meaning set out in Section 43A of the Competition Act;

“**market power**” means the power of an entity to control prices, or to exclude competition or to behave to an appreciable extent independently of its competitors, customers or suppliers;

“**Minister**” means the member of the Cabinet responsible for transport matters;

“**municipal transport authority**” means a regulatory authority—

- (a) established by a municipal government; and
- (b) whose mandate is implicated by the application of this Act;

“**National Ports Act**” means the National Ports Act, 2005 (Act No. 12 of 2005);

“**National Ports Authority**” means the Authority established in terms of Chapter 2 of the National Ports Act;

“**organ of state**” has the meaning set out in Section 239 of the Constitution;

“**Passenger Rail Agency of South Africa**” means the Corporation defined in Section 1 of the Legal Succession to the South African Transport Services Act, 1989 (Act No. 9 of 1989);

“**person**” includes a juristic person;

**“prescribed”** means determined, stipulated, required, authorized, permitted or otherwise regulated by a regulation made, or notice given, by the Minister in terms of this Act;

**“price control”** means a method for setting the maximum price that can be charged, or revenue that can be earned, by a regulated entity for the use of or access to its assets, facilities or services;

**“prohibited conduct”** means an act or omission—

(a) in contravention of—

- (i) this Act, or Section 5(2) of the Airports Company Act, or Section 5(2) of the Air Traffic and Navigation Services Company Act; or
- (ii) any condition attached to a price control that has been determined in terms of this Act; or

(b) that constitutes a charge greater than allowed under—

a price control that has been determined in terms of this Act; or

an agreement permitted in terms of Section 9(9)(c);

**“public regulation”** means any national, provincial or local government legislation or subordinate legislation, or any licence, price control, directive or similar authorisation issued by a regulatory authority or pursuant to any statutory authority;

**“regulated entity”** means an entity to which this Act applies in terms of—

- (a) Section 4(1); or
- (b) a declaration contemplated in Section 4(2);

**“regulation”** means a regulation made in terms of this Act;

**“Regulator”** means the Transport Economic Regulator established by Section 27;

“**regulatory authority**” means an entity established in terms of national or provincial legislation responsible for regulating an industry, or sector of an industry, but does not include a regulated entity in terms of this Act;

“**related**” when used in respect of two persons, has the meaning set out in Section 1 of the Companies Act, 2008 (Act No. 71 of 2008);

“**service**” means any activity involved in the transportation of persons or goods within the transport sector;

“**South African National Roads Agency Limited**” means the Agency defined in Section 1 of the South African National Roads Agency Limited and National Roads Act, 1998 (Act No. 7 of 1998);

“**tariff**” means any charge, fee, toll, fare or other amount that may be imposed by a regulated entity for the use of, or access to, any transport service or facility;

“**the State**” includes an organ of state;

“**this Act**” includes any regulations made, notice or direction given, or price control determined and published, in terms of this Act; and

“**transport sector**” means shipping and ports, aviation, rail or road transport.

## 2. Interpretation

- (1) This Act must be interpreted in a manner that gives effect to the purposes set out in Section 3.
- (2) If a provision of this Act requires a document to be signed or initialled by a party to a transaction, that signing or initialling may be effected in any manner recognised by law, including by use of—
  - (a) an advanced electronic signature, as defined in the Electronic Communications and Transactions Act, 2002 (Act No. 25 of 2002); or
  - (b) an electronic signature, as defined in the Electronic Communications and Transactions Act, 2002 (Act No. 25 of 2002).

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- (3) If there is an inconsistency between any provision of this Act and a provision of the Public Finance Management Act, 1999 (Act No. 1 of 1999) the provisions of the Public Finance Management Act prevail.
- (4) In respect of any matter arising under this Act, the provisions of this Act prevail in the case of an inconsistency between any provision of this Act, and a provision of—
- (a) the South African National Roads Agency Limited and National Roads Act, 1998 (Act No. 7 of 1998);
  - (b) the National Road Traffic Act, 1996 (Act No. 93 of 1996);
  - (c) the National Land Transport Act, 2009 (Act No.5 of 2009);
  - (d) the National Ports Act; 2005 (Act No. 12 of 2005);
  - (e) the Legal Succession to the South African Transport Services Act, 1989 (Act No. 9 of 1989);
  - (f) the Air Traffic and Navigation Services Act, 1993 (Act No. 45 of 1993);  
or
  - (g) the Airports Company Act, 1993 (Act No. 44 of 1993).

## **Part B – Purpose and Application of the Act**

### **3. Purposes of Act**

- (1) The purposes of this Act are to—
  - (a) promote the development of a competitive, efficient and viable South African transport industry contributing to economic growth and development;
  - (b) promote the development of an integrated system of economic regulation of transport of passengers and goods, through airports or ports, and by road or rail;
  - (c) promote efficiency, reliability, safety and performance in the management and operation of transport facilities and services, in accordance with recognised international standards and local requirements;
  - (d) establish appropriate institutional arrangements and procedures to support the consistent economic regulation of transport facilities and services;
  - (e) enhance transparency in the management of transport facilities and services; and
  - (f) promote appropriate investment in transport facilities and services.
- (2) The purposes of this Act are to be pursued in a manner that promotes—
  - (a) the development of small and medium enterprises; and
  - (b) the achievement of equality through measures designed to advance persons or categories of persons historically disadvantaged by unfair discrimination in the operation of and access to transport facilities and services.

#### 4. Application of Act

- (1) Subject to any exemptions contemplated in subsections (7) to (9), this Act applies to any market, entity, facility or service in the transport sector that was, immediately before the effective date, subject to economic regulation by the Minister in terms of any legislation listed in Section 2(4).
- (2) The Minister, in consultation with the Regulator, by notice in the *Gazette*, may declare that this Act applies to any market, or any entity, facility or service, irrespective whether privately or state owned, within the transport sector, if the Minister has determined that either of the following circumstances apply:
  - (a) a single operator controls more than 70% of the market for the facility or service concerned; or
  - (b) the preconditions for competition do not exist in the market for the facility or service concerned.
- (3) The extent of regulation introduced must be proportionate to the competition problems in the market.
- (4) When making a determination in terms of subsection (2)(b), the regulator must have found that-
  - (a) at least one firm operating in the market has market power; or
  - (b) a facility or resource in the market is an essential facility.after having received and considered-
  - (i) an opinion from the Competition Commission -
    - (aa) after conducting a market inquiry in terms of Section 43A of the Competition Act; or
    - (bb) on the basis of the Competition Tribunal finding that anti-competitive abuses have occurred within the relevant market; or

- (ii) a report from the market inquiry, conducted by the Regulator in terms of Section 41(2)(b).
- (5) Before the Minister may consider making a determination contemplated in subsection (2), the Regulator, in the prescribed manner and form—
  - (a) must publish the relevant opinion or report contemplated in subsection (4) in the *Gazette*, within the prescribed period; and
  - (b) must publish in the *Gazette* a notice that such a determination is being considered, and invite public submissions in response to the notice; and
  - (c) may conduct public hearings on the matter in appropriate circumstances.
- (6) A determination made by the Minister as contemplated in subsection (2) remains in force until withdrawn by a further determination by the Minister, but any such further determination may be made only after complying again with the requirements of subsections (4) and (5).
- (7) The Minister in consultation with the Regulator, by notice in the *Gazette*, may grant an exemption from the application of this Act to any specific market, entity, facility or service that is otherwise subject to the application of this Act if the Minister is satisfied that—
  - (a) The market, entity, facility or service does not have a material effect on competitive conditions within the transport sector; or
  - (b) none of the economic conditions contemplated in subsection (4) apply with respect to that market, entity, facility or service.
- (8) The Minister may grant an exemption in terms of subsection (7) either—
  - (a) in conjunction with a determination in terms of subsection (2) that would otherwise affect the entity being exempted; or
  - (b) at any other time, after complying with the requirements of subsections (4) and (5).

- (9) An exemption granted by the Minister in terms of subsections (7), remains in force until withdrawn by a notice by the Minister published in the *Gazette*, but any such notice may be made only after complying again with the requirements of subsections (4) and (5).
- (10) The Minister may make regulations regarding—
- (a) the timing, manner and form of notices and periods of public submissions;
  - (b) procedures for requesting and considering requests for exemptions; and
  - (c) other matters required for the proper application of this section.

## CHAPTER 2 - ACCESS TO RAIL INFRASTRUCTURE

### 5. Access to regulated infrastructure and facilities

- (1) Once the Minister has determined, in terms of Section 4, that this Act applies to rail infrastructure or facilities, the Regulator must determine the cost of access to that infrastructure or facilities, in terms of Section 9;
- (2) All entities that, immediately before the effective date, had access to rail infrastructure, will continue to have such access rights, in terms of the existing access agreements.
- (3) Within 60 business days from the date of the determination contemplated in subsection (1), an entity that is referred to in subsection (2), must notify the Regulator, in the prescribed manner and form, of such access rights.
- (4) Within one year from the date of the determination contemplated in subsection (1), an infrastructure owner must review any existing agreement that contains any unlawful provision or a provision that is inconsistent with this Act.
- (5) An infrastructure owner must lodge any existing agreement with the Regulator within one year from the date of the determination contemplated in subsection (1).
- (6) The following types of access requests may be regulated:
  - (a) use of declared infrastructure to run trains;
  - (b) requests to physically interconnect infrastructure with declared infrastructure; or
  - (c) requests to make investments in order to increase the capacity of declared infrastructure, where the owner of the declared infrastructure has declined to make the requested investment to the requested specifications.
- (7) The regulator may prescribe fees for the processing of access applications, and different fees may be set depending on the type of access requested, and the size and complexity of the access request.

- (8) An access agreement, at a minimum, must contain –
  - (a) the type of access request made;
  - (b) the description of the infrastructure or facility that is subject to the access agreement;
  - (c) the duration of the agreement;
  - (d) the details of all the parties to the agreement;
  - (e) the agreed access fees and associated conditions of service, as well as any penalties for non-performance that may have been agreed to;
  - (f) dispute resolution mechanisms; and
  - (g) any additional services and fees levied.
- (9) Before concluding an access agreement, the infrastructure owner must submit a notification detailing the terms of that access agreement, to the Regulator, in the prescribed manner and form, confirming that such terms are consistent with the provisions of this Act.

## **6. Request for access approval to Regulator**

- (1) Before approaching the Regulator, an access seeker must first try to negotiate the terms of the access agreement with an infrastructure owner in good faith.
- (2) If the parties fail to reach an agreement, either party can refer the matter to the Regulator for resolution.
- (3) When considering the matter referred to the Regulator in terms of subsection (2), the Regulator must invite the infrastructure owner and the access seeker to make written representations to the Regulator, within such period as the Regulator may determine.
- (4) In determining whether to grant access approval the Regulator must have regard to the following:

- (a) whether there is available capacity on the infrastructure or facility;
- (b) whether the access applicant is able to meet financial and other technical requirements necessary to successfully operate the infrastructure; and
- (c) whether the applicant has received other regulatory approvals that may be required by or in terms of any law or regulations, or is likely to receive such approvals before the finalization of its application.

#### **7. Decision on access approval**

- (1) The Regulator must grant access approval, if all the requirements set out in Section 6(4) are met.
- (2) The Regulator may grant access approval, even if the requirements of Section 6(4)(a) are not met, provided the access seeker has given a written undertaking to the Regulator, to fund the required investment in infrastructure.
- (3) If the Regulator grants access approval in terms of subsection (2) the access agreement must be of a sufficient duration as to allow for the access seeker to realise the value of its investment.
- (4) The Regulator may grant access to the access seeker contemplated in subsection (2), only once the new infrastructure or facility is built.
- (5) If the Regulator has granted access approval in terms of subsection (1) or (2), the access seeker and the infrastructure owner must enter into an access agreement within a period specified in the access approval, failing which the Regulator must determine the terms of the access agreement.
- (6) Any party that is aggrieved by a decision of the Regulator in terms of this section, may appeal to the Council against or apply to the Council for a review of the decision, in terms of Section 20.

## **8. Cession, transfer or assignment of access rights**

- (1) An entity that has been granted access approval in terms of Section 7(1) or (2), may cede or transfer any or all of its access rights to a third party, on condition that all its obligations remain fulfilled.
- (2) If an entity is not fully utilising access rights granted in terms of Section 7(1) or (2), the Regulator may re-assign such access rights to a new access seeker or back to the infrastructure owner, as the Regulator considers appropriate.

## Chapter 3 — Economic Regulation of Transport Facilities and Services

### Part A –Price Regulation

#### 9. Determination of price controls

- (1) Every regulated entity is subject to price regulation in accordance with a price control determined by the Regulator.
- (2) The price control for a regulated entity may comprise—
  - (a) a schedule of tariffs, charges, fees, tolls or other amounts that may be imposed by the regulated entity for the use of, or access to, any transport service, or facility offered by that regulated entity;
  - (b) a limit on the total amount of revenue it may raise from the facilities and services offered by it;
  - (c) a limit on the return it may derive from the assets utilized by it to provide its facilities and services; or
  - (d) any other appropriate pricing method, including any combination of the methods contemplated in paragraphs (a) to (c).
- (3) Each regulated entity must submit a proposal to the Regulator, requesting approval of a price control for the facilities and services offered by that regulated entity.
- (4) When considering a proposal submitted in terms of this section, the Regulator—
  - (a) must consult with interested parties and the public in the prescribed manner;
  - (b) must determine whether the proposal is fair and reasonable, after considering all relevant circumstances, including—
    - (i) the regulated entity's operating efficiency and effectiveness;
    - (ii) the need for investment and security of supply in the regulated market;

- (iii) the opportunity cost of capital including the average rate of return on other domestic or international facilities or services having similar or comparable risk;
  - (iv) the actual or forecast cost of debt;
  - (v) any reasonable cost differentials between the different types of facilities or services provided, arising due to geographical location or any other characteristic that the Regulator may deem relevant;
  - (vi) the likely effect of the proposed price control on the economy, employment, consumers and small or medium enterprises;
  - (vii) any advantage or disadvantage an operator has as a result of state investments, transfers, laws and regulation; and
  - (viii) any other specific criteria prescribed by regulation.
- (5) If the proposal for the price control approval relates to a service that is subsidised, the Regulator must consult with a party that is providing a subsidy, in the prescribed manner.
- (6) The regulator must consider any requests of the subsidizing party, and to the extent possible, in a cost-effective manner, must grant requests for-
- (a) the details of the price control to be coordinated with the subsidizing party's budget cycle;
  - (b) changes to the service level associated with the price control;
  - (c) slower implementation of price changes, subject to the payment of compensation for the delay to the operator; or
  - (d) access to any data on operator performance collected by the Regulator.
- (7) If the level of an existing subsidy changes materially, or a subsidy is introduced for a new service, the Regulator, on request by any interested party, may undertake

- research on the impact of the subsidy on intermodal competition, and provide an opinion to the party providing the subsidy and the requesting party.
- (8) The Regulator must consider each price control proposal on its merits in terms of subsection (4), and may—
- (a) determine the price control —
    - (i) as requested by the regulated entity, with or without conditions; or
    - (ii) as varied by the Regulator, with or without conditions; or
  - (b) require the regulated entity to submit a new or additional request, addressing any concerns that the Regulator may require, which may include a requirement to propose a different price control than originally proposed.
- (9) When determining a price control, the Regulator may impose conditions that—
- (a) provide for an annual adjustment to reflect changes in the relevant price index;
  - (b) set service standards in respect of any activity that is subject to the price control;
  - (c) permit the relevant regulated entity to enter into an agreement with any other person to charge and pay at a rate other than set by the price control, if the deviation from the price control can be justified in terms of a mutually acceptable deviation from standard terms of service, which is associated with changes in the cost of service provision.
- (10) Before the price deviation is implemented, the relevant regulated entity must submit to the Regulator the following:
- (a) a calculation of the impact of the proposed price control deviation on the entity's revenues, costs and profitability, as well as any other relevant material financial management metrics;

- (b) a statement declaring whether the proposed price control deviation will materially affect the basis on which the overarching price control is determined; and
  - (c) a statement declaring that other customers of the regulated entity will not be subjected to price increases, or reductions in service quality as a result of the proposed price control deviation.
- (11) Within 15 days of receipt of the price deviation request contemplated in subsection (10), the Regulator can request up to 60 business days to review the impact of the proposed price deviation and determine whether or not to approve it.
- (12) If the regulated entity receives no response from the Regulator within 15 business days, the price deviation is approved.
- (13) A price control, or any amendment to it, as determined by the Regulator—
- (a) must be published by the Regulator in the *Gazette* or in any other appropriate manner;
  - (b) takes effect on a date determined by the Regulator by notice in the *Gazette* or in any other manner contemplated in paragraph (a); and
  - (c) remains in effect until it has been withdrawn or replaced by a notice in the *Gazette* or in any other manner contemplated in paragraph (a), subject to—
    - (i) any decision of the Council in terms of Section 20, or of a court after a review in terms of Section 26(6); or
    - (ii) any subsequent reduction in terms of Section 19.
- (14) In respect of any facilities or services that are offered by a regulated entity and subject to a price control contemplated in subsection (2)(a), the regulated entity must not charge any person more than the maximum established—
- (a) in accordance with the price control as determined and published by the Regulator, or as subsequently reduced in terms of Section 19; or

- (b) by agreement to the extent permitted in terms of subsection (9)(c).

#### **10. Extraordinary review of price controls**

- (1) At any time after a price control takes effect, the Regulator may conduct an extraordinary review if the Regulator is satisfied that reasonably unforeseeable changes in economic demand, input costs, technology, the regulatory environment or other similar factors have affected the regulated entity sufficiently to constitute a threat to its economic sustainability during the current price control period and thus justify an early review of the price control.
- (2) The Regulator may conduct an extraordinary review in terms of subsection (1) either—
  - (a) on its own initiative; or
  - (b) on application, in the prescribed manner, from—
    - (i) the relevant regulated entity, or
    - (ii) the Minister; or
    - (iii) another person directly affected by that price control.
- (3) Section 9 applies to an extraordinary review in terms of this section.

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## Part B – Economic Oversight of Regulated Entities

### 11. Information from regulated entities

- (1) Each regulated entity must submit to the Regulator, in the prescribed manner and form—
  - (a) statistical information related to the transport facilities or services that it provides, or has licenced others to provide;
  - (b) forecasts of demand for the transport facilities or services that it provides, or has licenced others to provide;
  - (c) development plans for the facilities it operates, or has licenced others to operate, or the services that it provides or has licenced others to provide; and
  - (d) any material change in the control of persons it has licenced to operate facilities or provide services.
- (2) The Regulator may request any other information that is reasonably required by the Regulator to perform its functions in terms of this Act, including confidential information, subject to Section 58.
- (3) The Regulator must maintain the confidentiality of information provided to the Regulator in terms of this section, or any provision of this Act.

### 12. Regulatory accounting and disclosure requirements

- (1) The Regulator must define, develop, publish and administer standards for the preparation and presentation, by regulated entities, of financial and other relevant information to be considered in any price control determination or review, including the criteria to be used for the valuation and allocation of assets by regulated entities.

- (2) Each regulated entity must submit financial and other relevant information to the Regulator in accordance with the standards and criteria established in terms of subsection (1).
- (3) The Regulator may require a regulated entity to have an independent review of the financial and other relevant information contemplated in this section.
- (4) A review required in terms of subsection (3) may be carried out by the regulated entity's auditor, or by an alternative auditor nominated by the Regulator in consultation with the regulated entity.

### **13. Complaints against regulated entities**

- (1) Any person may file a complaint with the Regulator, in the prescribed manner and form, alleging that a regulated entity —
  - (a) has unreasonably or improperly refused to issue a licence or amended licence to the complainant;
  - (b) has unreasonably or improperly taken a decision that adversely affects the rights of the complainant;
  - (c) has failed to provide access to transport facilities or services in a non-discriminatory, fair and transparent manner;
  - (d) treats its own operations, or those of its subsidiary, more favourably than, and derives an unfair competitive advantage over, other providers of services;
  - (e) has failed to meet the service standards attached to a price control;
  - (f) impedes the efficiency of inter-modal transport operations; or
  - (g) has engaged in prohibited conduct.
- (2) Before submitting a complaint to the Regulator in terms of this section, the complainant, in appropriate cases, must have afforded a regulated entity an opportunity to resolve the complaint.

- (3) The Regulator must consider or investigate every complaint in accordance with the provisions of Part C, and the regulations.

### **Part C –Complaint Investigations by the Regulator**

#### **14. Direct referrals to Council**

- (1) Upon receiving a complaint in terms of Section 13(1)(a) or (b), the Regulator—
  - (a) may refer the complaint directly to the Council, to be considered in accordance with this section, if the Regulator has concluded that the complaint does not raise issues of general economic or public policy concern in terms of this Act; or
  - (b) otherwise, must consider the complaint in terms of Section 16.
- (2) If the Regulator refers a complaint to the Council in terms of subsection (1)(a)—
  - (a) the Regulator is not a party to the Council proceedings; and
  - (b) the Council must consider that complaint as an appeal by the complainant against the decision by the relevant regulated entity.
- (3) The Council must conduct a hearing of each matter referred to it in terms of this section in accordance with the provisions of Section 21.
- (4) Despite subsection (2)(a), the Council may invite the Regulator to provide any information that the Council may consider relevant to the proceedings in terms of subsection (3).
- (5) After considering a complaint referral under this section, the Council must confirm, set aside or vary the decision by the regulated entity.
- (6) If the Council has set aside a decision, as contemplated in subsection (5), the relevant regulated entity may consider the matter afresh, having regard to the Council's reasons for setting aside the decision that was the subject of the complaint, and take a new decision.

### 15. Consideration of complaints by Regulator

- (1) Unless it has referred a complaint to the Council in terms of Section 14, the Regulator, upon receiving a complaint, may—
  - (a) issue a notice of non-referral to the complainant in the prescribed form, if the complaint—
    - (i) appears to be frivolous or vexatious; or
    - (ii) does not allege any facts which, if proven, would constitute grounds for a remedy under this Act;
  - (b) refer the complaint to another regulatory authority with jurisdiction over the matter for investigation; or
  - (c) direct an inspector to investigate the complaint as quickly as practicable.
- (2) At any time, the Regulator, acting on its own initiative, may direct an inspector to commence an investigation into any matter contemplated in Section 13(1)(c) to (g), despite not having received a complaint in terms of that section.
- (3) At any time during an investigation, the Regulator may designate one or more persons to assist the inspector in conducting the investigation.
- (4) The procedure for conducting an investigation contemplated in this section, may be determined by the Regulator, with due regard to the circumstances of each case.

### 16. Outcome of investigation

After receiving a report of an investigation, the Regulator may—

- (a) issue a notice of non-referral to the complainant in the prescribed form;
- (b) refer the matter to the National Prosecuting Authority, if the Regulator alleges that a person has committed an offence in terms of this Act;
- (c) propose a draft consent order, in terms of Section 17;

- (d) issue a compliance notice in terms of Section 18; or
- (e) direct a price control reduction, in terms of Section 19.

### **17. Consent orders**

- (1) If a matter has been investigated by the Regulator, and the Regulator and the respondent agree to the proposed terms of an appropriate order, the Council, without hearing any evidence, may confirm the agreement as a consent order, in accordance with Section 46(1)(b), and lodge it with the High Court, for enforcement purposes.
- (2) Without limiting the generality of subsection (1), a consent order may include a directed price control reduction contemplated in Section 19.
- (3) With the consent of a complainant, a consent order confirmed in terms of subsection (1) may include an award of damages to that complainant.

### **18. Issuance of compliance notices**

- (1) Subject to subsection (2), the Regulator may issue a compliance notice in the prescribed form to the respondent in any investigation conducted by the Regulator in terms of Section 15.
- (2) A compliance notice contemplated in subsection (1) must set out—
  - (a) the person, association or entity to whom the notice applies;
  - (b) the provision of this Act, or another Act, that has not been complied with, if any;
  - (c) details of the nature and extent of the non-compliance or other reason for issuing the notice;
  - (d) any steps that are required to be taken and the period within which those steps must be taken; and

- (e) any penalty that may be imposed in terms of this Act if those steps are not taken.
- (3) A compliance notice issued in terms of this section remains in force until—
  - (a) it is set aside by the Council or a Court; or
  - (b) the Regulator issues a compliance certificate contemplated in subsection (4).
- (4) If the requirements of a compliance notice issued in terms of subsection (1) have been satisfied, the Regulator must issue a compliance certificate.
- (5) If a person, association or entity to whom a compliance notice has been issued fails to comply with the notice, the Regulator may either—
  - (a) refer the matter to the National Prosecuting Authority for prosecution as an offence in terms of Section 63; or
  - (b) direct a price control reduction, in terms of Section 19,  
but may not do both in respect of any particular compliance notice.
- (6) Any person, association or entity issued with a notice in terms of this section may appeal to the Council, or apply to the Council for a review, in the prescribed manner and form within—
  - (a) 15 business days after receiving that notice; or
  - (b) a longer period as may be allowed by the Council on good cause shown.

### **19. Directed price control reduction**

- (1) In the circumstances contemplated in Section 16(e), 17(2), or 18(5)(b), the Regulator may direct a reduction in the current applicable price control for any facilities or services provided by a regulated entity.

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- (2) When determining an appropriate reduction, the Regulator must consider the following factors:
- (a) the nature, duration, gravity and extent of the contravention or other conduct;
  - (b) the market circumstances in which the contravention or other conduct took place;
  - (c) any undue increase in profit directly derived from the contravention or other conduct;
  - (d) any loss or damage suffered by third parties as a result of the contravention or other conduct;
  - (e) any potential negative effect on third parties resulting from the reduction;
  - (f) the ability of such a reduction to correct any economic distortion resulting from the regulated entity's conduct;
  - (g) any similar previous contraventions or similar conduct by the respondent; and
  - (h) the level of cooperation of the respondent during the investigation.
- (3) A reduction in terms of this section—
- (a) applies only from the date on which the Regulator issues a direction in terms of this section;
  - (b) may be either—
    - (i) temporary, for a period determined by the Regulator; or
    - (ii) permanent, until the expiry of the price control that is being reduced;
  - (c) may apply to all, or any particular facilities or services to which the price control applies; and

- (d) must not be included in the consideration of price controls in the next price control determination cycle.
- (4) The total annual financial cost of the reduction to the regulated entity may not exceed more than 10% of the entity's annual turnover of its regulated business during the regulated entity's preceding financial year.
- (5) When a reduction has been imposed, the regulated entity must take reasonable steps to publicize the fact of the reduction and the extent, duration and reason for the reduction.

### **Part D – Review of Regulator's Decisions**

#### **20. Right to appeal to Council or apply for review**

- (1) A person contemplated in subsection (2) may appeal to the Council against, or apply to the Council for a review of, a certificate, notice, determination, ruling or other decision issued or made by the Regulator in respect of—
  - (a) the determination of a price control by the Regulator in terms of Part A of this Chapter;
  - (b) a complaint contemplated in Section 14 and investigated by the Regulator in terms of Section 15;
  - (c) access to rail infrastructure in terms of Section 7;
  - (d) an agreement or a licence contemplated in Sections 56 and 57(6A) of the National Ports Act, respectively, or
  - (e) a directed price control reduction in terms of Section 19.
- (2) The persons who may appeal or apply to the Council for review are—
  - (a) The Minister; or
  - (b) any person adversely affected by a certificate, notice, decision, determination or ruling issued or made by the Regulator.

- (3) After hearing—
  - (a) an appeal from a decision of the Regulator, the Council may confirm the decision, set it aside, modify it, or refer it back to the Regulator, subject to Section 26; or
  - (b) an application for review of a decision of the Regulator, the Council may confirm the decision, or refer the matter back to the Regulator
- (4) If requested to do so by an appellant or applicant for review, the Council may issue an order suspending the decision under appeal or review—
  - (a) until the Council has determined the appeal or application for review; or
  - (b) in the case of a directed price control reduction, only if the applicant can demonstrate exceptional circumstances in favour of such an order.

### **Part E –Hearing procedures**

#### **21. Procedure at Council hearings**

- (1) Hearings of any matter by the Council—
  - (a) must be conducted expeditiously and in accordance with the principles of natural justice; and
  - (b) may be conducted as informally as possible, consistent with paragraph (a).
- (2) The hearing proceedings are open to the public, but the person presiding at the hearing may exclude members of the public, or specific persons or categories of persons, from attending the proceedings—
  - (a) if evidence to be presented is confidential information, but only to the extent that the information cannot otherwise be protected;
  - (b) if the proper conduct of the hearing requires it; or

- (c) for any other reason that would be justifiable in civil proceedings in a High Court.
- (3) The Chairperson of the Council must assign each matter referred to the Council to a panel constituted in accordance with Section 46(3).

## **22. Right to participate in hearing**

- (1) The following persons may participate in any hearing contemplated in this Part, in person or through a legal representative, and may put questions to witnesses and inspect any books, documents or items presented at the hearing:
  - (a) the Regulator;
  - (b) the applicant or complainant, and the respondent;
  - (c) the Minister; and
  - (d) any other person who has a material interest in the hearing.

## **23. Powers of Council at hearing**

The Council may—

- (a) direct or subpoena any person to appear at any specified time and place;
- (b) question any person under oath or affirmation;
- (c) subpoena or order any person—
  - (i) to produce any book, document or item necessary for the purposes of the hearing; or
  - (ii) to perform any other act in relation to this Act; and
- (d) give directions prohibiting or restricting the publication of any evidence given to the Council.

## 24. Rules of procedure

Subject to the requirements of this Act, the Council—

- (a) must establish rules for its proceedings; and
- (b) may determine any matter of procedure for a particular hearing, with due regard to the circumstances of the case.

## 25. Witnesses

- (1) Every person giving evidence at a hearing must answer any relevant question.
- (2) The law regarding a witness's privilege in a criminal case in a court of law applies equally to a person who provides information during a hearing.
- (3) During a hearing, the person presiding may order a person to answer any question, or to produce any article or document, subject to subsection (4).
- (4) Section 54(4) and (5) apply to any person questioned, or any evidence given, at a hearing in terms of this section.

## 26. Decision at end of hearing

- (1) Within 20 business days of the conclusion of a hearing, the panel that heard the matter must publish a decision, together with written reasons for the decision.
- (2) The decision supported by a majority of the members of the Panel is the decision of the Council in that matter.
- (3) When considering an appeal or review of a price control determined by the Regulator, the Council must—
  - (a) assess the—
    - (i) process followed by the Regulator in approving the price control; and
    - (ii) general reasonableness of the price control; and

- (b) either affirm the price control as determined by the Regulator, or refer the price control back to the Regulator for re-consideration.
- (4) When considering an appeal or a review of a compliance notice, or price control reduction notice, the Council may confirm, modify or cancel all or part of the notice.
- (5) If the Council confirms or modifies all or part of a compliance notice, the applicant must comply with that notice as confirmed or modified, within the time period specified in it.
- (6) A decision by the Council may be taken on review to the High Court, subject to its rules.
- (7) When exercising its powers in terms of Section 20(3), the Council may confirm, modify or set aside all or any part of a ruling or decision.

## Chapter 4—Establishment of Institutions

### Part A –Transport Economic Regulator

#### 27. Establishment of Transport Economic Regulator

- (1) The Transport Economic Regulator is established as an organ of state within the public administration, but as an institution outside the public service.
- (2) The Regulator is—
  - (a) a juristic person, with jurisdiction throughout the Republic;
  - (b) is independent, and subject only to the Constitution and the law;
  - (c) must be impartial and perform its functions without fear, favour or prejudice; and
  - (d) must exercise the functions assigned to it in terms of any law in—
    - (i) the most cost-efficient and effective manner; and
    - (ii) accordance with the values and principles mentioned in Section 195 of the Constitution.
- (3) On any matter concerning the governance of the Regulator referred to in Section 28(9), or that this Act or any other legislation requires to be determined by the Board, a decision supported by a majority of all of the members of the Board is the decision of the Regulator.
- (4) On any matter not contemplated in subsection (3), a decision taken, in accordance with this Act and the Regulator's operational rules, by a majority of the members of the Executive Regulatory Panel is the decision of the Regulator.

#### 28. Governance of the Transport Economic Regulator

- (1) The Regulator is governed by a Board comprising—

- (a) 6 non-executive members appointed by the Minister; and
  - (b) the Chief Executive Officer, who serves on the Board subject to subsection (11).
- (2) Before appointing non-executive members of Board, the Minister by notice in the *Gazette*, must-
- (a) invite members of the public to submit nominations for persons who meet the requirements set out in Section 29(1)(a), to serve on the Board; and
  - (b) establish a panel of experts on governance and public policy, to compile a shortlist of candidates from the received nominations.
- (3) The Minister must appoint the non-executive members of the Board from the list of candidates compiled by the panel of experts.
- (4) Within 20 business days from the date of appointment of the non-executive members of the Board, the Minister must publish a notice of such appointment in the *Gazette*.
- (5) Each non-executive member of the Board serves on a part-time basis, and for a term of 4 years, subject to subsection (3).
- (6) When the first appointments are made to the Board, or at any time there is a complete simultaneous turnover of the Board's non-executive membership, the terms of the non-executive Board members must be varied, so that some are appointed to serve for 3 years, and the remainder for 4 years.
- (7) A non-executive member may be re-appointed to a second term, subject to Section 29.
- (8) The Minister must designate a non-executive member to be the Chairperson of the Board.
- (9) The Board must—
- (a) guide the strategic development of the Regulator;

- (b) oversee and ensure the effective and efficient use of the Regulator's resources;
  - (c) ensure that the Regulator is in compliance with all its legal requirements and its reporting and financial accountability obligations;
  - (d) approve and monitor compliance with the procedures for the consideration of regulatory matters by the Executive Regulatory Panel;
  - (e) appoint and oversee the performance in office of the Chief Executive Officer and each Executive Officer;
  - (f) provide advice to the Chief Executive Officer, upon request in terms of Section 33(1)(c) or (d), on any matter concerning the functioning of the Regulator.
- (10) The Board—
- (a) must not interfere in the decisions of the Executive Regulatory Panel in the performance of its regulatory functions;
  - (b) may refer to the Minister any matter concerning the functioning of the Regulator; and
  - (c) is the Accounting Authority of the Regulator, in terms of the Public Finance Management Act (Act No. 1 of 1999).
- (11) The Chief Executive Officer is an *ex officio* member of the Board, who—
- (a) has a vote in any decision by the Board or a Board committee relating to the appointment, performance evaluation, and dismissal of Executive Officers; but
  - (b) may not otherwise vote in Board or Board committee meetings.
- (12) The Board must meet at least once every three months, at a place and time determined by the Chairperson.

- (13) The quorum for any meeting of the Board is a majority of non-executive members of the Board.
- (14) Proceedings of the Board, and any decisions taken by a majority of the members present and entitled to participate in those decisions, are valid despite the fact that—
- (a) there may have been a vacancy in the Board at the time;
  - (b) a member of the Board failed to disclose an interest as required by Section 30(3); or
  - (c) a member of the Board, who had an interest contemplated in Section 30(3), attended those proceedings, participated in them in any way, or directly or indirectly influenced those proceedings.

#### **29. Qualifications for Board membership**

- (1) Each person appointed as a non-executive member of the Board must—
- (a) be suitably qualified, with experience in economics, law, accounting, public finance or governance; and
  - (b) submit to the Minister a written declaration stating that the person is not subject to any disqualification in terms of subsection (2).
- (2) A person may not be appointed, or remain, as a non-executive member of the Board if that person—
- (a) is an office bearer of any party, movement, organisation or body of a partisan political nature;
  - (b) personally—
    - (i) has or acquires a direct financial interest in, or is a director of, a regulated entity; or

- (ii) has been in the 3 years preceding the appointment, or becomes, a director or an employee of an entity or enterprise that is subject to regulation in terms of this Act; or
- (iii) has or acquires an interest in, or is a director or an employee of, a business or enterprise that may conflict or interfere with the proper performance of the duties of a member of the Board;
- (c) is related to a person who has an interest in, or is a director of, a business or enterprise contemplated in paragraph (b);
- (d) is an unrehabilitated insolvent;
- (e) is subject to an order of a competent court holding the person to be mentally unfit or disordered;
- (f) is subject to an order of a competent court declaring the person to be a delinquent director, or placing the person under probation, in terms of Section 162 of the Companies Act, 2008 (Act No. 71 of 2008);
- (g) has been convicted of an offence committed after the Constitution of the Republic of South Africa, 1993 took effect, and sentenced to imprisonment without the option of a fine; or
- (h) has been removed from an office of trust, by a competent authority.

### **30. Conduct and conflicts of Board members**

- (1) A non-executive member of the Board must promptly inform the Minister in writing if the member, or a person who is related or inter-related to the member, acquires an interest that is, or is likely to become, an interest contemplated in Section 29(2)(b).
- (2) A non-executive member of the Board must not—
  - (a) engage in any activity that may undermine the integrity of the Regulator;

- (b) attend, participate in or influence the proceedings during a meeting of the Board, if, in relation to the matter before the Board, that member, or a related or inter-related person, has an interest that precludes that member from performing the functions of a member of the Board in a fair, unbiased and proper manner;
  - (c) vote at any meeting of the Board in connection with a matter contemplated in paragraph (b);
  - (d) make private use of, or profit from, any confidential information obtained as a result of performing that person's functions as a member of the Board; or
  - (e) divulge any information referred to in paragraph (d) to any third party, except as required as part of that person's official functions as a member of the Board.
- (3) If, at any time, it appears to a member of the Board that a matter being considered by the Board at a meeting concerns an interest of that member, or of a related or inter-related person, referred to in Section 29(2)(b), that member must—
- (a) immediately and fully disclose the nature of that interest to the meeting; and
  - (b) withdraw from the meeting to allow the remaining members to discuss the matter and determine whether the member should be prohibited from participating in any further proceedings concerning that matter.
- (4) The disclosure by a member of the Board in terms of subsection (3)(a), and the decision by the Board in terms of subsection (3)(b), must be expressly recorded in the minutes of the meeting in question.

### **31. Resignation, removal from office, and vacancies**

- (1) A non-executive member of the Board may resign by giving to the Minister—
- (a) three months written notice; or

- (b) less than three months written notice, with the approval of the Minister.
- (2) The Minister, after taking the steps required by subsection (3), may remove a non-executive member of the Board, only if that member has—
  - (a) become disqualified in terms of Section 29(2);
  - (b) acted contrary to Section 30(1) or (2);
  - (c) failed to disclose an interest or withdraw from a meeting as required by Section 30(3); or
  - (d) neglected to properly perform the functions of their office.
- (3) Before removing a person from office in terms of subsection (2), the Minister must afford the person an opportunity to state a case in defence of their position.
- (4) The Minister, after following the process set out in Section 28, must fill a vacancy that was caused by the resignation or removal of a non-executive member of the Board in terms of subsection (1) or (2).
- (5) A non-executive member of the Board appointed in terms of subsection (4) holds office for an unexpired portion of the predecessor's term of office.
- (6) Upon the expiry of a non-executive Board member's first term of office, the member may be re-appointed to a further term, subject to Section 29.

### **32. Regulator's executive structures**

- (1) The powers and functions of the Regulator are to be exercised and performed, in accordance with this Act and the Regulations, by its executive officers, staff and contractors, functioning within the following offices and structures:
  - (a) The Chief Executive Officer, who—
    - (i) has the powers and functions set out in Section 33 or elsewhere in this Act; and

- (ii) is appointed in terms of Section 34;
  - (b) A number of Executive Officers, as—
    - (i) established by the Board on the recommendation of the Chief Executive Officer in terms of subsection (2); and
    - (ii) appointed in terms of Section 34;
  - (c) The Executive Regulatory Panel, as described in subsection (4); and
  - (d) The Executive Administrative Committee, as described in subsection (5).
- (2) The Chief Executive Officer must recommend to the Board the establishment of at least three positions to be filled by Executive Officers, and the proposed mandate for each of those positions.
- (3) Each Executive Officer is responsible for matters pertaining to the functions of the Regulator, as assigned by the Chief Executive Officer.
- (4) The Executive Regulatory Panel—
- (a) comprises the Chief Executive Officer and a minimum of three Executive Officers;
  - (b) collectively makes decisions on all regulatory matters in terms of this Act; and
  - (c) must establish, and publish internal procedures governing the consideration of the regulatory matters assigned to it and the issuing of regulatory decisions, which must include, at a minimum, the following -
    - (i) timeframes for the consideration of relevant matters;
    - (ii) information for public dissemination;
    - (iii) treatment of confidential information; and
    - (iv) review of impact of regulatory decisions.

- (5) The Executive Administrative Committee —
  - (a) comprises the Chief Executive Officer and any other officers or staff of the Regulator, as determined by the Board on the recommendation of the Chief Executive Officer; and
  - (b) considers and may determine internal administrative matters concerning the functioning of the Regulator.
- (6) The Board, on the recommendation of the Chief Executive Officer, may establish other Executive committees to address particular matters.

### **33. Chief Executive Officer**

- (1) The Chief Executive Officer—
  - (a) must provide administrative support to facilitate the Board carrying out its functions;
  - (b) must provide advice to the Board on any matter that this Act, or any other legislation, requires the Board to determine;
  - (c) must refer any governance matter arising under this Act to the Board for an advisory opinion, if requested to do so by the Executive Regulatory Panel; and
  - (d) may make a referral contemplated in paragraph (c) at any other time.
- (2) The Chief Executive Officer may—
  - (a) appoint employees or contractors to assist in performing the functions of the Regulator, other than the Executive Officers;
  - (b) assign any management or other duties to employees of the Regulator, who have appropriate skills to assist in the management, or control over any function of the Regulator;

- (c) delegate, with or without conditions, any of the powers or functions of the Chief Executive Officer to any suitably qualified employee of the Regulator, but any such delegation does not divest the Chief Executive Officer of responsibility for the exercise or any power or performance of any duty; and
  - (d) establish temporary or permanent staff or administrative committees to advise the Regulator on any technical, administrative or financial matter.
- (3) The Chief Executive Officer—
- (a) is responsible for all matters pertaining to the functions of the Regulator; and
  - (b) is responsible to the Board for—
    - (i) all income and expenditure of the Regulator;
    - (ii) all revenue collected by the Regulator; and
    - (iii) all assets, and the discharge of all liabilities, of the Regulator.

### **34. Appointment of executive officers**

- (1) The Board must appoint suitably qualified persons, with experience in economics, law, accounting or the transportation industry, as Chief Executive Officer, and as Executive Officers of the Regulator.
- (2) A person may not be appointed, or continue to hold office, as Chief Executive Officer or Executive Officer if that person is subject to any disqualification that would apply to a member of the Board, as set out in Section 29(2).
- (3) The Chief Executive Officer holds office for a term of four years.
- (4) A person may be re-appointed as Chief Executive Officer on the expiry of the person's first term of office.
- (5) Each Executive Officer—

- (a) holds office for a term of five years, subject to subsection (6); and
  - (b) may be re-appointed on expiry of each term.
- (6) On the recommendation of the Chief Executive Officer, the Board must designate, for each Executive Officer position, a member of staff of the Regulator who is not an Executive Officer to serve as an alternate for the Executive Officer in the case of any absence of the incumbent Executive Officer, or vacancy in the position.

### **35. Resignation or removal of executive officers**

- (1) The Chief Executive Officer, and any Executive Officer, may resign by giving three months' notice in writing to the Board.
- (2) The Board—
  - (a) must remove the Chief Executive Officer or an Executive Officer who ceases to qualify for that office in terms of Section 34(2); and
  - (b) otherwise may remove the Chief Executive Officer or Executive Officer only for—
    - (i) serious misconduct;
    - (ii) permanent incapacity;
    - (iii) gross incompetence, gross mis-management or substantial failure to perform the person's official functions; or
    - (iv) contravening Section 47, or engaging in any other activity that may undermine the integrity of the Regulator.

### **36. Functions of Regulator**

- (1) The Regulator must carry out the functions and exercise the powers assigned to it by or in terms of this Act or any other national legislation and, in particular, must—

- (a) exercise economic regulation of transport facilities and services in line with prevailing national economic policy contemplated in Section 3, and national strategic objectives;
- (b) regulate the provision of adequate and efficient transport facilities and services;
- (c) promote efficiency in transport facilities and services by facilitating competition, where possible, and implementing regulations;
- (d) promote equitable access to transport facilities and services;
- (e) promote appropriate investment in transport facilities and services;
- (f) research market structures and service delivery to determine whether or not particular entities, markets, facilities or services within the transport sector are functioning competitively;
- (g) conduct market inquiries in accordance with Section 41(2)(b);
- (h) determine price controls for transport facilities and services in accordance with Part A of Chapter 3 and, for that purpose, may determine methods of price regulation as appropriate for the economic circumstances of regulated entities;
- (i) monitor and enforce compliance with this Act, and with any service levels and other conditions of price controls; and
- (j) investigate complaints contemplated in Section 13, and initiate investigations in terms of Section 15(2).

### **37. General provisions concerning Regulator**

- (1) In carrying out its functions, the Regulator may—
  - (a) have regard to regional or international developments in the field of economic regulation of transport; and

- (b) consult any person, organisation or institution with regard to any matter.
- (2) In respect to a particular matter within its jurisdiction or responsibility, the Regulator may exercise its responsibility by way of an agreement contemplated in Section 41(11)(c).
- (3) The Regulator, after consultation with the Minister, may issue directives relating to the functions of the Regulator, including—
- (a) forms;
  - (b) time periods;
  - (c) information required;
  - (d) filing fees;
  - (e) access to confidential information; and
  - (f) manner and form of participation in Regulator procedures.
- (4) The remuneration and benefits of—
- (a) the Chief Executive Officer and other Executive Officers, must be determined by the Board, after consultation with the Minister; and
  - (b) any other staff of the Regulator, must be determined by the Chief Executive Officer, in accordance with the remuneration policy approved by the Board.

### **38. Development of codes of practice relating to Act**

The Regulator may develop, and promote the voluntary use of, codes of practice in respect of any matter to better achieve the purposes of this Act.

**39. Promotion of legislative and regulatory reform**

- (1) In order to better achieve the purposes of this Act in relation to laws that govern matters affecting the economic regulation of transport facilities and services, the Regulator must—
  - (a) identify any international agreement, or any national or provincial legislation, or other public regulation, that—
    - (i) affects the economic regulation of transport facilities and services; and
    - (ii) is inconsistent with the purposes of this Act;
  - (b) consult with relevant provincial authorities, organs of state within the national sphere of government, and the public with respect to legislation identified in terms of paragraph (a) with the object of developing proposals for reform of that legislation; and
  - (c) report from time to time to the Minister with recommendations for achieving the progressive transformation and reform of laws contemplated in this section.
- (2) The Regulator may advise the Minister to consider the promulgation of new regulations in terms of this Act, or the amendment or repeal of any existing regulations.

**40. Research and public information**

- (1) The Regulator must promote public awareness and increase knowledge of the economic nature and dynamics of the transport market, and for that purpose—
  - (a) must publish—
    - (i) its decisions on substantive matters in terms of this Act;
    - (ii) abstracts of non-confidential information reported to the Regulator by regulated entities in terms of Section 12;

- (iii) results of its completed research or studies regarding the purposes of this Act;
  - (iv) statistical data collected, on the performance of the transport sector; and
  - (v) any orders and findings of the Council or a court in respect of this Act.
- (b) may implement education and information measures to develop public awareness of the purposes of this Act;
  - (c) may enter into partnerships with universities and other academic institutions to develop training and research programmes;
  - (d) may provide guidance to the public by—
    - (i) issuing explanatory notices outlining its procedures, or its non-binding opinion on the interpretation of any provision of this Act; or
    - (ii) applying to a Court for a declaratory order on the interpretation or application of any provision of this Act.
- (2) The Regulator may request any person requesting the Regulator to conduct any research in terms of this Act, to fund the cost of the research, and may decline to conduct such research, if the required funding is not provided.
  - (3) The Regulator must keep a publicly accessible register, in the prescribed manner and form, of all price controls approved and published in terms of this Act.
  - (4) When communicating with the public as required by this section, the Regulator must employ effective means of disseminating information, including freely accessible internet publishing.

#### **41. Relations with other regulatory authorities**

- (1) The Regulator must—
  - (a) negotiate and conclude an agreement with the Competition Commission to co-ordinate and harmonise the exercise of jurisdiction over competition

- matters, and to ensure consistent application of the principles of this Act;  
and
- (b) liaise with any entity that has jurisdiction over safety issues within the transportation sector, to harmonise the exercise of jurisdiction over transportation matters.
- (2) At any time, the Regulator, on its own initiative or in response to a request from the Minister in terms of Section 43(1) –
- (a) may request the Competition Commission to consider whether particular entities, markets, facilities or services within the transport sector are failing to functioning competitively or are characterized by anti-competitive abuses; or
- (b) conduct a market inquiry—
- (i) if it has reasonable grounds to suspect that any feature or combination of features of the market within any transport sector prevents, distorts or restricts competition or leads to anti-competitive outcomes within that market or the economy; or
- (ii) to achieve the purposes of this Act.
- (3) The Regulator, at least 20 business days before the commencement of a market inquiry, must publish a notice in the *Gazette*-
- (a) announcing the establishment of the market inquiry;
- (b) setting out the terms of reference for the market inquiry; and
- (c) inviting members of the public to provide information to the market inquiry.
- (4) The Regulator may conduct a market inquiry in any manner but, for greater certainty, the provisions of Sections 53 to 58, read with the changes required by the context, apply to the conduct of the market inquiry in terms of subsection (2), and to the publication of the report of a market inquiry in terms of subsection (8).

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- (5) The terms of reference referred to in subsection (3) must include, at a minimum –
- (a) a statement of the scope of the inquiry; and
  - (b) the time within which it is expected to be completed.
- (6) The Regulator may amend the terms of reference referred to in subsection (3), including the scope of the inquiry, or the time within which it is expected to be completed, by a further notice in the *Gazette*.
- (7) The Regulator must complete a market inquiry by publishing a report contemplated in subsection (8), within the time set out in the terms of reference contemplated in subsection (3).
- (8) Upon completing a market inquiry, the Regulator must –
- (a) publish a report of the inquiry in the *Gazette*; and
  - (b) submit the report to the Minister with or without recommendations.
- (9) The recommendations to the Minister contemplated in subsection (8)(b) may include—
- (a) a change in the application of the Act as contemplated in Section 4(2);
  - (b) recommendations for new or amended policy, legislation or regulations;  
or
  - (c) recommendations to other regulatory authorities.
- (10) On the basis of information obtained during a market inquiry, the Regulator may—
- (a) initiate a complaint in accordance with Section 13(1), with or without conducting any further investigation;
  - (b) initiate and refer a complaint directly to the Council without further investigation;

- (c) take any other action within its powers in terms of this Act recommended in the report of the market inquiry; or
  - (d) take no further action
- (11) The Regulator may—
- (a) advise and receive advice from any regulatory authority;
  - (b) liaise with any regulatory authority on matters of common interest and, without limiting the generality of this power, may monitor, require necessary information from, exchange information with, and receive information from, any such authority pertaining to—
    - (i) matters of common interest; or
    - (ii) a specific complaint or investigation;
  - (c) negotiate agreements with any regulatory authority to co-ordinate and harmonize the exercise of jurisdiction over the economic regulation of transport within the relevant industry or sector, and to ensure the consistent application of the principles of this Act; and
  - (d) participate in the proceedings of any regulatory authority.
- (12) A regulatory authority that, in terms of any public regulation, exercises jurisdiction over transport matters within a particular industry or sector—
- (a) may negotiate agreements with the Regulator, as anticipated in subsection (11)(c), and
  - (b) may exercise its jurisdiction by way of such an agreement in respect of a particular matter within its jurisdiction.
- (13) The President may assign to the Regulator any duty of the Republic to exchange information with a similar foreign agency in terms of an international agreement relating to the purposes of this Act.

- (14) The Regulator may liaise with any foreign or international authorities having any objects similar to the functions and powers of the Regulator.

#### **42. Advice and recommendations to the Minister**

In addition to any other advice or reporting requirements set out in this Act, the Regulator—

- (a) may advise the Minister—
  - (i) on matters relating to the economic regulation of transport facilities and services;
  - (ii) of any substantive changes to the structure or competitiveness of any transport market, facility or service; or
  - (iii) in respect of any matter referred to it by the Minister;
- (b) may recommend to the Minister changes to bring about uniformity in the legislation in the various provinces in relation to transport facilities and services, as contemplated in Section 39; and
- (c) may enquire into and report to the Minister on any matter concerning the purpose of this Act.

#### **43. Minister may call for inquiries or investigations**

- (1) The Minister, by notice in the *Gazette*, may request the Regulator to conduct a market inquiry, in terms of Section 41(2), in relation to any economic aspect of the transport sector.
- (2) At any time, the Minister may —
  - (a) give a written direction to the Regulator to investigate any matter or circumstances with respect to the purposes of this Act, whether or not those circumstances appear at the time of the direction to amount to a possible contravention of this Act; or

- (b) consult with the Regulator on any matter arising under this Act.

### **Part B –Transport Economic Council**

#### **44. Establishment of Transport Economic Council**

- (1) The Transport Economic Council is hereby established as an organ of state within the public administration, but as an institution outside the public service.
- (2) The Council—
- (a) is a juristic person, with jurisdiction throughout the Republic;
  - (b) is independent, and subject only to the Constitution and the law;
  - (c) must be impartial and perform its functions without fear, favour or prejudice; and
  - (d) must exercise the functions assigned to it in terms of any law in—
    - (i) the most cost-efficient and effective manner; and
    - (ii) accordance with the values and principles mentioned in Section 195 of the Constitution.

#### **45. Council members**

- (1) The Council comprises a chairperson and not fewer than five, or more than nine, other members, each appointed by the Minister.
- (2) Before making an appointment contemplated in subsection (1), the Minister, by notice in the *Gazette*, must call for nominations of persons who meet the requirements set out in subsection (3) to serve on the Council, from members of the public.

- (3) The members of the Council, when viewed collectively, must comprise sufficient suitably qualified persons with experience in law, economics, accounting and the transportation industry.
- (4) A person may not be appointed, or continue to serve, as a member of the Council if that person is subject to any disqualification that would apply to a member of the Board, as set out in Section 29(2).
- (5) Each member of the Council serves on a full-time or part-time basis, as determined by the Minister, in accordance with subsection (6).
- (6) The Minister, having regard to the historical and reasonably anticipated workload of the Council—
  - (a) must determine, at the time each member is appointed, whether that member is to be full-time or part-time; and
  - (b) with the consent of a member at any time during the member's term of office, may change that member from part-time to full-time.
- (7) Each member of the Council serves for a term of 4 years, subject to subsection (8).
- (8) When the first appointments are made to the Council, or at any time there is a complete simultaneous turnover in the membership of the Council, the terms of Council members must be varied, so that some of the members are appointed to serve for 3 years, and the remainder for 4 years.
- (9) A member of the Council may be re-appointed to one further term, subject to subsection (4).
- (10) A member of the Council may resign by giving three months' notice in writing to the Minister, but the Minister may permit a member to resign with shorter notice.
- (11) A member of the Council must inform the Minister in writing if that member, or a related or inter-related person acquires an interest that is, or is likely to become, an interest contemplated in Section 29(2)(b).

- (12) The Minister—
- (a) must remove a member of the Council if the member ceases to qualify for that office in terms of subsection (4); and
  - (b) otherwise may remove a member from office only for—
    - (i) serious misconduct or dereliction of responsibilities;
    - (ii) permanent incapacity; or
    - (iii) contravening subsection (11) or Section 47, or engaging in any other activity that may undermine the integrity of the Council.
- (13) If a member of the Council ceases to hold office before the end of the member's term, the Minister, after following the process contemplated in subsection (2), may appoint another person to serve the remainder of the member's term of office.

#### **46. Council functions and procedures**

- (1) The Council considers and determines—
- (a) referrals of complaints against regulated entities, in terms of Section 14;
  - (b) referrals of consent agreements in terms of Section 17; and
  - (c) appeals or applications for review in terms of Section 20 of any certificate, notice, decision, determination or ruling of the Regulator.
- (2) The Council must conduct a hearing, subject to its rules, into every matter referred to it in terms of this Act, and publish its decisions in the prescribed manner and form.
- (3) The Chairperson of the Council must manage the caseload of the Council, and must convene a hearing before at least three of the members of the Council to consider any matter, and must—

- (a) ensure that at least one member of the panel is a person who has legal training and experience; and
  - (b) designate a member of the panel to preside over the proceedings.
- (4) The Chairperson of the Panel, or a member designated by the chairperson, on application by an interested person, , may determine whether a decision by the Regulator is to be suspended pending the outcome of the Council's proceeding on the matter, as contemplated in Section 20(4).

## **PART C – ADMINISTRATIVE MATTERS CONCERNING REGULATOR AND COUNCIL**

### **47. Conflicting interests**

- (1) The Chief Executive Officer, each other employee of the Regulator, and each person appointed by the Chief Executive Officer to be an inspector or investigator, and each member of the Council, must not—
- (a) engage in any activity that may undermine the integrity of the Regulator, or the Council, as the case may be;
  - (b) participate in any investigation, hearing, or decision concerning a matter in respect of which that person, or a related or inter-related person has an interest that would preclude that person from performing their functions in a fair, unbiased and proper manner;
  - (c) make private use of, or profit from, any confidential information obtained as a result of performing that person's official functions in the Regulator or the Council, as the case may be; or
  - (d) divulge any information referred to in paragraph (c) to any third party, except as required as part of that person's official functions.
- (2) Without limiting the generality of subsection (1), an employee, investigator or inspector retained by the Regulator, before participating in any investigation, inquiry or decision by the Regulator, must disclose to the Regulator any significant

relationship with a person who is materially affected, or likely to be materially affected, by that investigation, inquiry or decision.

- (3) For the purpose of subsection (2), “**significant relationship**” includes any—
- (a) employment relationship, or professional engagement, within the immediately preceding 12 months; or
  - (b) connection to a related or inter-related person.

#### **48. Finances**

- (1) The Regulator and the Council are each financed from—
- (a) the annual fees to be paid by regulated entities, as determined by the Minister in terms of Section 49;
  - (b) money appropriated by Parliament;
  - (c) any other fees payable in terms of this Act;
  - (d) income derived from its investment and deposit of surplus money in terms of subsection (2)(b); and
  - (e) other money accruing from any other source that does not create a conflict of interest.
- (2) The Regulator and Council—
- (a) must each prepare their own budgets and administer their own finances in accordance with the provisions of the Public Finance Management Act (Act No. 1 of 1999), and other relevant legislation; and
  - (b) may invest or deposit money that is not immediately required for contingencies or to meet current expenditures—
    - (i) on a call or short-term fixed deposit with any registered bank or financial institution in the Republic; or

- (ii) in an investment account with the Corporation for Public Deposits established in terms of Section 2 of the Corporation for Public Deposits Act, 1984 (Act No. 46 of 1984).
- (3) The financial year of the Regulator and the Council, respectively, is the period of 12 months beginning 1 April each year, and ending on the following 31 March, except that the first financial year—
  - (a) begins on the effective date; and
  - (b) ends on the next following 31 March.

**49. Minister to determine annual fees to be paid by regulated entities**

- (1) Each year, the Regulator and the Council must prepare and submit to the Minister a joint proposal in the prescribed manner and form, requesting the setting of an annual fee to be paid in the following financial year by each regulated entity under this Act, to give effect to the following principles:
  - (a) the regulated entities are to bear the cost of the Regulator and the Council; and
  - (b) there must be general proportionality between the cost of regulating each regulated entity, service or facility and the extent of its contribution to the shared revenue pool for the Regulator and the Council.
- (2) The Minister, in consultation with the Minister of Finance must determine, and publish by notice in the Gazette —
  - (a) the annual fee to be paid by each regulated entity which may be different for different entities or categories of entities;
  - (b) a formula for sharing, between the Regulator and the Council, the revenue raised by those annual fees; and

- (c) regulations establishing a framework for allocating and attributing the costs of the Regulator and Council among the regulated entities in a manner generally consistent with the principles set out in subsection (1).
- (3) The formula for sharing the revenue raised from annual fees, to be determined in terms of subsection (2)(b), must ensure that the Regulator and Council each receive an adequate revenue flow, independent of each other, as appropriate to perform their functions and ensure their financial viability, having regard to any other source of funding contemplated in Section 46(1).
- (4) Any dispute arising out of or relating to the annual fees, the formula for sharing those fees or the remittance of the fees referred to in this section, must be referred to the Minister for resolution, in consultation with the Minister of Finance.
- (5) At three month intervals, each regulated entity must remit to the regulator one quarter of the annual fee payable by that entity, as determined by the Minister in terms of subsection (2).
- (6) Within 30 days after receiving a remittance in terms of subsection (5), the Regulator must—
  - (a) apportion the remittance between the Regulator and the Council in accordance with the allocation formula determined in terms of subsection (2); and
  - (b) remit the Council's share to the Council.

#### **50. Board and Council members remuneration**

The Minister, in consultation with the Minister of Finance, must determine the remuneration and benefits of the members of the Board and members of the Council.

#### **51. Reviews and reports by Regulator and Council**

- (1) In addition to any other reporting requirement set out in this Act, the Regulator and the Council must each report to the National Assembly at least once every year on

their respective activities, as required by the Public Finance Management Act, 1999 (Act No. 1 of 1999).

- (2) The Regulator and the Council must each deliver to the Minister copies of their annual reports.
- (3) The Minister, by regulation, may prescribe standards for the form and content of the annual reports, but any such regulation must, at a minimum, require the regulator to include a report on—
  - (a) compliance with this Act by transport sector;
  - (b) significant compliance contraventions;
  - (c) access to infrastructure;
  - (d) outcome of any market inquiry conducted;
  - (e) price controls set or approved; and
  - (f) formal consultations undertaken with regards to proposed changes to price control methodologies.
- (4) At least once every five years, the Minister must conduct a review of the exercise of the functions and powers of the Regulator and of the Council, relative to the policy and purposes of this Act.

## 52. Regulations

- (1) The Minister, by notice in the *Gazette*—
  - (a) may make any regulations expressly authorised or contemplated elsewhere in this Act;
  - (b) on the recommendation of the Council, may make regulations relating to the functions of the Council, including—
    - (i) forms;

- (ii) time periods;
  - (iii) information required;
  - (iv) filing fees;
  - (v) access to confidential information; and
  - (vi) manner and form of participation in Council procedures; and
- (c) may make regulations regarding any matter that may be considered necessary or expedient to prescribe in order to achieve the objects of this Act.
- (2) Before making any regulations in terms of subsection (2), the Minister must publish the proposed regulations in the *Gazette* for public comment, for a period of at least 30 business days.

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**Chapter 5—Enforcement of the Act****Part A – Powers in support of investigation****53. Appointment of inspectors and investigators**

- (1) The Chief Executive Officer—
  - (a) may appoint any suitable employee of the Regulator or any other suitable person employed by the State, as an inspector; and
  - (b) must issue each inspector with a certificate in the prescribed form stating that the person has been appointed as an inspector in terms of this Act.
- (2) When an inspector performs any function of an inspector in terms of this Act, the inspector—
  - (a) must be in possession of a certificate of appointment issued to that inspector in terms of subsection (1); and
  - (b) must show that certificate to any person who—
    - (i) is affected by the inspector's actions in terms of this Act; and
    - (ii) requests to see the certificate; and
  - (c) has the powers of a peace officer as defined in Section 1 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), and may exercise the powers conferred on a peace officer by law.
- (3) The Chief Executive Officer may appoint or contract any suitably qualified person, as an investigator, to conduct research, audits, inquiries or other investigations on behalf of the Regulator, but a person appointed in terms of this subsection is not an inspector within the meaning of this Act.

## 54. Subpoena

- (1) At any time during an investigation being conducted in terms of this Act, the Chief Executive Officer, or any other Executive Officer, may—
  - (b) issue a subpoena to any person who is believed to be able to furnish any information on the subject of the investigation, or to have possession or control of any book, document or other object that has a bearing on that subject—
    - (i) to appear before the Regulator, or before an inspector or investigator, to be questioned at a time and place specified in the subpoena; or
    - (ii) to deliver or produce to the Regulator, or to an inspector or investigator, any book, document or other object referred to in paragraph (a) at a time and place specified in the subpoena.
- (2) A subpoena contemplated in subsection (1)—
  - (a) must be signed by the Chief Executive Officer, an Executive Officer, or by an employee of the Regulator designated by the Chief Executive Officer; and
  - (b) may be served in the same manner as a subpoena in a criminal case issued by the magistrate's court.
- (3) An inspector or investigator before whom a person is summoned to appear, or to whom a person is required to deliver any book, document or other object, may—
  - (a) interrogate and administer an oath to, or accept an affirmation from, the person named in the subpoena; and
  - (b) retain any such book, document or other object for examination, for a period not exceeding two months, or such longer period as the Council, on application and good cause shown, may allow.

- (4) A person questioned by the Regulator or by an inspector or investigator conducting an investigation must answer each question truthfully and to the best of that person's ability, but—
- (a) a person is not obliged to answer any question if the answer is self-incriminating; and
  - (b) the person asking the questions must inform that person of the right set out in paragraph (a).
- (5) No self-incriminating answer given or statement made by any person to the Regulator, or an inspector or investigator exercising powers in terms of this Act, will be admissible as evidence against that person in criminal proceedings against that person instituted in any court, except in criminal proceedings for perjury or in which that person is tried for an offence contemplated in Section 61(3) or 62(d), and then only to the extent that the answer or statement is relevant to prove the offence charged.

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

- (1) A judge of the High Court or a magistrate may issue a warrant to enter and search any premises that are within the jurisdiction of that judge or magistrate, if, from information on oath or affirmation, there are reasonable grounds to believe that—
- (a) a contravention of this Act has taken place, is taking place, or is likely to take place on or in those premises; or
  - (b) that anything connected with an investigation in terms of this Act is in the possession of, or under the control of, a person who is on or in those premises.
- (2) A warrant to enter and search may be issued at any time and must specifically—
- (a) identify the premises that may be entered and searched; and
  - (b) authorise an inspector or a police officer to enter and search the premises and to do anything listed in Section 56.

- (3) A warrant to enter and search is valid until one of the following events occurs:
- (a) the warrant is executed;
  - (b) the warrant is cancelled by the person who issued it or, in that person's absence, by a person with similar authority;
  - (c) the purpose for issuing it has lapsed; or
  - (d) the expiry of one month after the date it was issued.
- (4) A warrant to enter and search may be executed only during the day, unless the judge, regional magistrate, or magistrate who issued it authorises that it may be executed at night at a time that is reasonable in the circumstances.
- (5) A person authorised by warrant issued in terms of subsection (2) may enter and search premises named in that warrant.
- (6) Immediately before commencing with the execution of a warrant, a person executing that warrant must either—
- (a) if the owner, or person in control, of the premises to be searched is present—
    - (i) provide identification to that person and explain to that person the authority by which the warrant is being executed; and
    - (ii) hand a copy of the warrant to that person or to the person named in it; or
  - (b) if none of those persons is present, affix a copy of the warrant to the premises in a prominent and visible place.

#### **56. Powers to enter and search**

- (1) A person who is authorised under Section 55 to enter and search premises may—
- (a) enter upon or into those premises;
  - (b) search those premises;

- (c) search any person on those premises if there are reasonable grounds for believing that the person has personal possession of an article or document that has a bearing on the investigation;
  - (d) examine any article or document that is on or in those premises that has a bearing on the investigation;
  - (e) request information about any article or document from the owner of, or person in control of, the premises or from any person who has control of the article or document, or from any other person who may have the information;
  - (f) take extracts from, or make copies of, any book or document that is on or in the premises that has a bearing on the investigation;
  - (g) use any computer system on the premises, or require assistance of any person on the premises to use that computer system, to –
    - (i) search any data contained in or available to that computer system;
    - (ii) reproduce any record from that data; and
  - (h) seize any output from that computer for examination and copying; and
  - (i) attach, and, if necessary, remove from the premises for examination and safekeeping, anything that has a bearing on the investigation.
- (2) Section 54(5) applies equally to an answer given or statement made to an inspector or police officer in terms of this section.
- (3) An inspector authorised to conduct an entry and search in terms of Section 51 may be accompanied and assisted by a police officer.

### **57. Conduct of entry and search**

- (1) A person who enters and searches any premises under Section 56 must conduct the entry and search with strict regard for decency and order, and with regard for each person's right to dignity, freedom, security and privacy.

- (2) During any search under Section 56(1)(c), only a female inspector or police officer may search a female person, and only a male inspector or police officer may search a male person.
- (3) A person who enters and searches premises under Section 56, before questioning anyone—
  - (a) must advise that person of the right to be assisted at the time by an advocate or attorney; and
  - (b) allow that person to exercise that right.
- (4) A person who removes anything from premises being searched must—
  - (a) issue a receipt for it to the owner of, or person in control of, the premises; and
  - (b) return it as soon as practicable after achieving the purpose for which it was removed.
- (5) During a search, a person may refuse to permit the inspection or removal of an article or document on the grounds that it contains privileged information.
- (6) If the owner or person in control of an article or document refuses in terms of subsection (5) to give that article or document to the person conducting the search, the person conducting the search may request the registrar or sheriff of the High Court that has jurisdiction to attach and remove the article or document for safe custody until that court determines whether or not the information is privileged.
- (7) A police officer who is authorised to enter and search premises under Section 56, or who is assisting an inspector who is authorised to enter and search premises under this section may overcome resistance to the entry and search by using as much force as is reasonably required, including breaking a door or window of the premises.
- (8) Before using force in terms of subsection (7), a police officer must audibly demand admission and must announce the purpose of the entry, unless it is reasonable to

believe that doing so may induce someone to destroy or dispose of an article or document that is the object of the search.

- (9) The Regulator may compensate anyone who suffers damage because of a forced entry during a search when no one responsible for the premises was present.

#### **58. Claims that information is confidential**

- (1) When submitting information to the Regulator, or to an inspector or an investigator appointed in terms of this Act, a person may claim that all or part of that information is confidential.
- (2) Any claim contemplated in subsection (1) must be supported by a written statement explaining why the information is confidential.
- (3) The Regulator must—
  - (a) consider a claim made in terms of subsection (1); and
  - (b) immediately make a decision on the confidentiality of the information and access to that information, which decision may or may not be supported by reasons.
- (4) When making any ruling, decision or order in terms of this Act, the Regulator or a Council may take confidential information into account.
- (5) If any reasons for a decision in terms of this Act would reveal any confidential information, the Regulator or a court must provide a copy of the proposed reasons to the party claiming confidentiality at least 5 business days before publishing those reasons.
- (6) Within 5 business days after receiving a copy of proposed reasons in terms of subsection (5), a party may apply to the court for an appropriate order to protect the confidentiality of the relevant information.

## 59. Powers of a Court

In addition to any other order that it may make under this Act or any other law, a Court considering a matter in terms of this Act may—

- (a) order a person to alter or discontinue any conduct that is inconsistent with this Act;
- (b) make any order specifically contemplated in this Act; and
- (c) award damages for collective injury to all or a class of persons generally, to be paid on any terms or conditions that the Court considers just and equitable and suitable to achieve the purposes of this Act.

## Part B – Offences and Penalties

### 60. Breach of confidence

- (1) It is an offence to disclose any personal or confidential information concerning the affairs of any person obtained—
  - (a) in carrying out any function in terms of this Act; or
  - (b) as a result of initiating a complaint, or participating in any proceedings in terms of this Act.
- (2) Subsection (1) does not apply to information disclosed—
  - (a) for the purpose of the proper administration or enforcement of this Act;
  - (b) for the purpose of the administration of justice; or
  - (c) at the request of an inspector or regulatory authority entitled to receive the information.

**61. Hindering administration of Act**

- (1) It is an offence to hinder, oppose, obstruct or unduly influence any person who is exercising a power or performing a duty delegated, conferred or imposed on that person by this Act.
- (2) A person commits an offence who, having been summoned—
  - (a) fails without sufficient cause to appear at the time and place specified or to remain in attendance until excused; or
  - (b) attends as required, but—
    - (i) refuses to be sworn in or to make an affirmation; or
    - (ii) fails to produce a book, document or other item as ordered, if it is in the possession of, or under the control of, that person.
- (3) A person commits an offence who, having been sworn in or having made an affirmation—
  - (a) fails to answer any question fully and to the best of that person's ability, subject to Section 54(4) and (5); or
  - (b) gives false evidence, knowing or believing it to be false.

**62. Offences relating to Regulator and Council**

A person commits an offence who—

- (a) does anything calculated to improperly influence the Regulator concerning any matter connected with an investigation;
- (b) does anything in connection with an investigation that would have been contempt of court if the proceedings had occurred in a court of law;
- (c) knowingly provides false information to the Regulator or Council;

- (d) wilfully interrupts the proceedings or misbehaves in the place where a hearing is being conducted;
- (e) acts contrary to a warrant to enter and search; or
- (f) without authority, but claiming to have authority in terms of Section 51–
  - (i) enters or searches premises; or
  - (ii) attaches or removes an article or document.

### **63. Offences relating to prohibited conduct**

- (1) It is an offence to fail to act in accordance with a compliance notice.
- (2) A regulated entity may not be prosecuted for an offence under subsection (1) if the Regulator has already imposed a price control reduction in terms of Section 19 for the particular failure to satisfy a compliance notice.

### **64. Penalties**

- (1) Any person convicted of an offence in terms of this Act, is liable to a fine or to imprisonment for a period not exceeding 5 years, or to both a fine and imprisonment.
- (2) Despite anything to the contrary contained in any other law, a Magistrate's Court has jurisdiction to impose any penalty provided for in this section.

### **65. Vicarious liability**

- (1) If an employee or agent of a person is liable in terms of this Act for anything done or omitted in the course of that person's employment or activities on behalf of their principal, the employer or principal is jointly and severally liable with that person.
- (2) This section does not apply in respect of criminal liability.

**Part C – Miscellaneous matters****66. Civil actions and jurisdiction**

- (1) If an agreement, provision of an agreement, or a notice to which a transaction or agreement is purported to be subject is, in terms of any provision of this Act considered void, that agreement, provision, or notice must be regarded as being of no force or effect at any time, unless a court has declared that the relevant provision of this Act does not apply to the impugned agreement, provision or notice.
- (2) A person who has suffered loss or damage as a result of prohibited conduct, or dereliction of required conduct—
  - (a) may not assert a claim in a civil Court for the assessment of the amount or awarding of damages if that person has consented to an award of damages in a consent order; or
  - (b) if entitled to commence an action referred to in paragraph (a), when instituting proceedings, must file with the Registrar or Clerk of the Court a notice from the Chairperson of the Council in the prescribed form—
    - (i) certifying whether the conduct constituting the basis for the action has been found to be prohibited or required conduct in terms of this Act;
    - (ii) stating the date of the Council finding, if any; and
    - (iii) setting out the section of this Act in terms of which the Council made its finding, if any.
- (3) A certificate referred to in subsection (2)(b) is conclusive proof of its contents.
- (4) An appeal or application for review against an order made by the Council in terms of this Act suspends any right to commence an action in a Civil Court with respect to the same matter, unless the Court orders otherwise.

**67. Limitations of bringing action**

- (1) A complaint in terms of this Act may not be referred or made more than three years after—
  - (a) the act or omission that is the cause of the complaint;
  - (b) the date on which the Regulator became aware, or ought reasonably to have been aware, of the cause of the complaint; or
  - (c) in the case of a course of conduct or continuing practice, the date that the conduct or practice ceased.
- (2) A complaint in terms of this Act may not be referred against any person who is, or has been, a respondent in proceedings under another section of this Act relating substantially to the same conduct.

**68. Serving documents**

Unless otherwise provided in this Act, a notice, order or other document that, in terms of this Act, must be served on a person, will have been properly served when it has been either—

- (a) delivered to that person;
- (b) sent by electronic mail to the person's email address; or
- (c) delivered by registered mail to that person's address.

**69. Proof of facts**

- (1) In any criminal proceedings in terms of this Act—
  - (a) if it is proved that a false statement, entry or record or false information appears in or on a book, document, plan, drawing or computer storage medium, the person who kept that item may be presumed to have made the statement, entry, record or information, unless the contrary is proved; and

- (b) an order certified by the Chairperson of the Council is conclusive proof of the contents of the order of the Council.
- (2) A statement, entry or record, or information, in or on any book, document, plan, drawing or computer storage medium is admissible in evidence as an admission of the facts in or on it by the person who appears to have made, entered, recorded or stored it unless it is proved that that person did not make, enter, record or store it.

## **Chapter 6 - General Provisions**

### **70. Consequential amendments and transitional arrangements**

- (1) The laws referred to in Schedule 1 are hereby amended in the manner set out in that Schedule.
- (2) The amendment of the laws specified in this section does not affect the transitional arrangements, which are set out in Schedule 2.

### **71. Short title and commencement**

- (1) This Act is called the Economic Regulation of Transport Act, 2018, and comes into operation on a date fixed by the President by proclamation in the Gazette.
- (2) The President may set different dates for different provisions of this Act to come into operation, subject to Item 2 of Schedule 2.

## Schedule 1—Consequential Amendments

### 1. Amendment of the National Ports Act

- (1) In this Item, “principal Act” means the National Ports Act, 2005 (Act No. 12 of 2005).
- (2) Section 1 of the principal Act is amended by the substitution in subsection (1), for the definition of “Regulator”, of the following definition:

““**Regulator**” means the **[Ports Regulator established by Section 29]** Transport Economic Regulator established by Section 27 of the Economic Regulation of Transport Act, 2018.”

- (3) The principal Act is amended by the repeal of sections 29 to 45.
- (4) The principal Act is amended by the substitution, for Section 46, of the following section:

“Appeals

**46** Any port user or licensed operator whose rights are adversely affected by a decision of the Authority may appeal against that decision to the Regulator, in the manner directed under Section 30(3), or prescribed in terms of the Economic Regulation of Transport Act, 2018.”

**[(2) After considering the appeal the Regulator must—**

- (a) confirm, set aside or vary the decision; or**
- (b) substitute the decision of the Authority for its own.]**

- (5) Section 47 of the principal Act is amended by—
- (a) the substitution, for subsection (1), of the following subsection:

“(1) Any complaint against the Authority must be lodged with the Regulator in the manner directed under Section 30(3), or

prescribed in terms of the Economic Regulation of Transport Act, 2018.”

(b) the substitution, for the opening clause of subsection (2), of the following opening clause:

“(2) A complaint against the Authority may be based on any ground provided for by the Regulator by direction under Section 30(3), or prescribed in terms of the Economic Regulation of Transport Act, 2018, or on the ground that—”

(6) The principal Act is amended by the repeal of Sections 48 to 55.

(7) Section 56 of the principal Act is amended by –

(a) the substitution, for subsection (2), of the following subsection:

“(2) An agreement concluded in terms of this section must –

(a) provide for the Authority to monitor and annually review performance with regard to the operation of the terminal or facility and the provision of the relevant services in terms of a performance standard specified in the agreement[.]; and

(b) be lodged with the Regulator.”

(b) the insertion, after subsection (2), of the following subsection:

“(2A) The performance reviews contemplated in subsection (2)(a) must be lodged with the Regulator.”

(c) the substitution, for subsection (5), of the following subsection:

“(5) An agreement contemplated in subsection (1) or (4) (a) may only be entered into by the Authority in accordance with a procedure, and must produce an outcome, that is fair, equitable, transparent, competitive and cost-effective.”

(d) the addition of the following subsections:

“(6) the Regulator may prescribe the requirements, that are necessary to achieve the outcomes set out in subsection (5).

(7) Within one year from the effective date, the Authority must review any existing agreement that does not achieve the outcomes contemplated in subsection (5).

(8) If an agreement contemplated in subsection (1) or (4) includes an entity that is a subsidiary, or a division of an entity under whose ownership, management or control the Authority falls, as a party, the agreement -

(a) must be approved by the Regulator; or

(b) the Regulator may request variations to the agreement,

depending on what the Regulator considers necessary to meet the requirements of subsection (5).

(9) If the circumstances contemplated in subsection (8) apply, the fees payable to the Authority in terms of Section 73(1)(c), accrue to the Regulator.”

(8) Section 57 of the principal Act is amended by the insertion, after subsection (6), of the following subsections:

“(6A) If a licence contemplated in subsection (2), is issued to an entity that is a subsidiary, or a division of an entity, under whose ownership, management or control the Authority falls, the licence-

(a) must be approved by the Regulator; or

(b) the Regulator may request variations to the licence,

depending on what the Regulator considers necessary to ensure a fair, equitable, transparent, competitive and cost-effective operation of the market in which the licensee will operate.

(6B) If the circumstances contemplated in subsection (6A) apply, the fees payable to the Authority in terms of Section 73(1)(c), accrue to the Regulator.

(6C) Within one year from the effective date, the Authority must review any existing licence that does not achieve the outcomes contemplated in subsection (5)."

- (9) Section 62 of the principal Act is amended by the addition of the following subsection:

"(6) Every licensed operator, when submitting a report or other information to the Authority in terms of subsection (2), (3) or (5)(a) or (f), must submit a copy of that report or information at the same time to the Regulator."

- (10) Section 72 of the principal Act is amended by the substitution, for subsection (1), of the following subsection:

"72 (1)[(a)] The Authority—

Must [, with the approval of the Ports] prepare a proposed price control for approval by the Regulator in terms of the Economic Regulation of Transport Act, 2018.[determine tariffs for the services and facilities offered by the Authority, and annually publish a tariff book containing those tariffs.

(b) The Authority may, with the approval of the Ports Regulator amend the tariff book whenever it is necessary to do so.]"

- (11) Section 80 of the principal Act is amended by –

- (a) the substitution, for subsection (1), of the following subsection:

“(1) The Minister may, in consultation with the Regulator, by notice in the *Gazette*, make regulations in respect of –

(a) the licensing of activities carried out in the ports and at off-shore cargo-handling facilities;

(b) the establishment, construction, maintenance and operation of off-shore cargo handling facilities;”

(b) the insertion, after subsection (1), of the following subsection:

“(1A) The Minister may, by notice in the *Gazette*, make regulations in respect of –”

(c) the deletion, from subsection (2), of paragraphs (e) and (p).

## 2. Amendment of the Airports Company Act

(1) In this Item, “principal Act” means the Airports Company Act, 1993 (Act No. 44 of 1993).

(2) Section 1 of the principal Act is amended by the substitution, for the definition of “committee”, of the following definition:

““committee” means the [Regulating Committee established by Section 11] Transport Economic Regulator established by Section 27 of the Economic Regulation of Transport Act, 2018;”

(3) Section 5 of the principal Act is amended by the deletion, from subsection (2), of paragraphs (e) and (f).

(4) Section 12 of the principal Act is amended by the substitution, for subsection (1), of the following subsection:

“(1) The company shall not levy any airport charge at any company airport [unless it is in possession of a valid written permission thereto] except in accordance with a price control approved and published in terms of the Economic Regulation of Transport Act, 2018.”

- (5) Section 13 of the principal Act is amended by the substitution, for subsections (1) and (2), of the following subsections:

“(1) If the company has indicated in a business plan contemplated in Section (7) that it intends to close or sell any aerodrome mentioned in Section 6(1)(a) or to terminate or substantially curtail a relevant activity which was carried on by the Department or any person on behalf of the Department immediately prior to the transfer date at such aerodrome, the company shall at the same time as it submits such business plan to the Shareholding Minister in terms of Section 7, submit a copy thereof to the **[Committee] Minister**.

“(2) The **[Committee] Minister** shall—

(a) consider and evaluate the implications of the intended action of the company mentioned in subsection (1) for—

- (i) the transport system of the Republic;
- (ii) the users of the said aerodrome or relevant activity;
- (iii) the community or region which the said aerodrome serves;  
and
- (iv) any other affected institution or person; and

(b) **[make recommendations to the Minister]** may request advice from the Transport Economic Regulator, in terms of the Economic Regulation of Transport Act, 2018, regarding any action [which he]that the Minister may take in terms of subsection (3) or (4).”

- (6) Section 14 of the principal Act is amended by the substitution, for subsection (1), of the following subsection:

“ Any person who feels aggrieved by the failure of the company to comply with any provision of Section 5(2) or 12 (1) **[or (12)]** may **[lodge with the Committee a complaint, which shall be accompanied by proof of the failure]** file a complaint with the Transport Economic

Regulator in terms of Section 14 of the Economic Regulation of Transport Act, 2018.”

- (7) The principal Act is amended by the deletion of Sections 5(2)(e) and (f), 11, 12(2) to (12), and 14(2) to (4).

**3. Amendment of the Air Traffic and Navigation Services Company Act**

- (1) In this Item, “**principal Act**” means the Air Traffic and Navigation Services Company Act, 1993 (Act No. 45 of 1993).
- (2) Section 1 of the principal Act is amended by the substitution, for the definition of “committee”, of the following definition:

“**“Committee”** means the [**Committee as defined in Section 1 of the Airports Company Act, 1993**] Transport Economic Regulator established by Section 27 of the Economic Regulation of Transport Act, 2018;”

- (3) Section 11 of the principal Act is amended by the substitution, for subsection (1), of the following subsection:

“(1) The company shall not levy an air traffic service charge [**unless it is in possession of a valid written permission thereto**] except in accordance with a price control approved and published in terms of the Economic Regulation of Transport Act, 2018.”

- (4) Section 12 of the principal Act is amended by the substitution, for subsections (1) and (2), of the following subsections:

“(1) If the company has indicated in a business plan contemplated in Section (7) that it intends to close or sell any air navigation infrastructure mentioned in Section 6(1)(a) or to terminate or substantially curtail an air traffic service or air navigation service which was rendered by the State or any person on behalf of the State immediately prior to the transfer date, the company shall at the same time as it submits such business plan to the

Shareholding Minister in terms of Section 7, submit a copy thereof to the [Committee] Minister.

“(2) The [Committee] Minister shall—

(a) consider and evaluate the implications of the intended action of the company mentioned in subsection (1) for—

(i) the transport system of the Republic;

(ii) the users of the said infrastructure or such service; and

(iii) any other affected institution or person; and

(b) **[make recommendations to the Minister]** may request advice from the Transport Economic Regulator, in terms of the Economic Regulation of Transport Act, 2018, regarding any action [which he] that the Minister may take in terms of subsection (3) or (4).”

(5) Section 13 of the principal Act is amended by the substitution, for subsection (1), of the following subsection:

“ Any person who feels aggrieved by the failure of the company to comply with any provision of Section 5(2) or 11(1) **[or (12)]** may **[lodge with the Committee a complaint, which shall be accompanied by proof of the failure]** file a complaint with the Transport Economic Regulator in terms of Section 14 of the Economic Regulation of Transport Act, 2018.”

(6) The principal Act is amended by the deletion of Sections 5(2)(e) and (f), 11(2) to (12), and 13(2) to (4).

#### 4. Amendment of the National Land Transport Act

Section 21 of the National Land Transport Act, 2009 (Act No. 5 of 2009) is amended by the deletion, from subsection (1), of paragraph (c).

## 5. Amendment of the South African National Roads Agency Limited and National Roads Act

- (1) In this Item, "principal Act" means the South African National Roads Agency Limited and National Roads Act, 1998 (Act No. 7 of 1998).
- (2) Section 27 of the principal Act is amended by—
  - (a) the substitution in subsection (3), for paragraph (a), of the following paragraph:

“(a) is determined by the [**Minister on the recommendation of the Agency**] Transport Economic Regulator in terms of Part A of Chapter 3 of the Economic Regulation of Transport Act, 2018;”
  - (b) the deletion, from subsection (3), of paragraphs (c) and (d); and
  - (c) the deletion of subsection (4).
- (3) Section 28 of the principal Act is amended by the addition of the following subsection:

“(5) The Transport Economic Regulator, established by Section 27 of the Economic Regulation of Transport Act, 2018, may require an agreement contemplated in subsection (1) to make provision for periodic review by the Transport Economic Regulator, of the level of tolls charged in terms of the agreement.”

## Schedule 2—Transitional Provisions

### 1. Definitions

A reference in this Schedule to—

- (a) The **“Ports Regulator”** is a reference to the entity established under that name in terms of Chapter 5 of the National Ports Act.
- (b) to a section by number is a reference to the corresponding section of this Act;
- (c) to an item or a sub-item by number is a reference to the corresponding item or sub-item of this Schedule.

### 2. Continuation of tariffs in force at effective date

- (1) Despite Section 9—
  - (a) a tariff or similar method of price regulation in effect immediately before the effective date in terms of any law respecting a transport facility or service remains in effect as if it had been a price control determined and published in terms of Section 9, until the date on which the Regulator first determines and publishes a new price control applicable to that facility or service, subject only to sub-item (2); and
  - (b) an agreement of the type contemplated in Section 9(9)(c), that was in effect immediately before the effective date, remains in effect as if it had been approved in terms of this Act, until the date on which the Regulator first determines and publishes a new price control applicable to the relevant facility or service.
- (2) A pre-existing tariff or similar method of price regulation that remains in effect in terms of sub-item (1) may be reviewed in the manner provided for in Section 10.

### **3. Appeals and complaints**

- (1) An appeal contemplated in Section 46 of the National Ports Act against a decision taken by the National Ports Authority before the effective date, may—
  - (a) be filed with the Regulator as a complaint in terms of Section 13(1)(a) or (b) of this Act, provided that no such appeal or application for review had been filed under any other law before the effective date; or
  - (b) be considered and determined under the National Ports Act, as if that Act had not been amended in terms of Schedule 1.
- (2) A complaint, as contemplated in Section 13, in respect of conduct that occurred before the effective date may—
  - (a) be filed with the Regulator in terms of Section 13 of this Act, provided that no such complaint or similar process had been commenced under any other law before the effective date; or
  - (b) be referred to the Regulator to conclude an investigation into the complaint.
- (3) The Regulator may exercise any power of the Ports Regulator, in terms of the National Ports Act, to investigate any complaint in terms of the relevant Act concerning conduct that occurred during the period of 3 years immediately before the effective date.
- (4) In exercising authority under this Item, the Council, or the Regulator, as the case may be, must conduct the investigation, hearing or other matter in accordance with the relevant Act as if it had not been amended in terms of Schedule 1 of this Act.

### **4. General preservation of regulations, rights, duties, notices and other instruments**

- (1) Any right or entitlement enjoyed by, or obligation imposed on, any person in terms of any provision of a repealed law, that had not been spent or fulfilled immediately before the general effective date must be considered to be a valid right or entitlement of, or obligation imposed on, that person in terms of any comparable

provision of this Act, as from the date that the right, entitlement or obligation first arose, subject to the provisions of this Act.

- (2) A notice given by any person to another person in terms of any provision of a repealed law must be considered as notice given in terms of any comparable provision of this Act, as from the date that the notice was given under the repealed law.
- (3) A document that, before the general effective date, had been served in accordance with a repealed law must be regarded as having been satisfactorily served for any comparable purpose of this Act.
- (4) An order given by an inspector, in terms of any provision of a repealed law, and in effect immediately before the general effective date, continues in effect, subject to the provisions of this Act.

## **5. Regulations**

On the effective date, and for a period of 60 business days after the effective date, the Minister may make any regulation contemplated in the Act without meeting the procedural requirements set out in Section 9 or elsewhere in this Act, provided the Minister has published those proposed regulations in the *Gazette* for comment for at least 30 business days.

## **6. Transition of Ports Regulator**

- (1) A person in the employ of the Ports Regulator immediately before the effective date becomes an employee of the Regulator on the effective date.
- (2) The transfer of employees to the Regulator must be effected in accordance with—
  - (a) Section 197 of the Labour Relations Act, 1995 (Act No. 66 of 1995); and
  - (b) any collective agreement reached between the State and the trade union parties of the Departmental Chamber of the Public Service Bargaining Council before the effective date.

- (3) The terms and conditions of office or employment of a person contemplated in sub-item (2) are identical to the terms and conditions of office or employment subsisting between that person and the Ports Regulator immediately before the effective date, subject to any further determination by the Board and the Chief Executive Officer in the exercise of their respective authority set out in this Act; and
- (4) Any person transferred in terms of sub-item (1), who—
  - (a) immediately before the effective date, was a member of the Government Employees' Pension Fund mentioned in Section 2 of the Government Employees' Pension Law, 1996—
    - (i) remains such a member; and
    - (ii) is entitled to pension and retirement benefits as if that person were in service in a post classified in a division of the public service mentioned in Section 8 (1)(a)(i) of the Public Service Act; or
  - (b) as an employee or office holder of the Ports Regulator immediately before the effective date, had any rights to participate in, or vested rights in terms of, any pension scheme or medical scheme, retains those rights, subject to any further determination by the Board in the exercise of its authority set out in this Act.
- (5) A person referred to in sub-item (1) remains subject to any decisions, proceedings, rulings and directions applicable to that person immediately before the effective date, and any proceedings against such a person, that were pending immediately before the effective date, must be disposed of as if this Act had not been enacted.
- (6) As of the effective date—
  - (a) all movable assets of the Ports Regulator immediately before the effective date, or movable assets of the State that were used by, or which were at the disposal of, the Ports Regulator immediately before the effective date, except any assets excluded by the Minister, become the property of the Regulator;

- (b) all contractual rights, obligations and liabilities of the Ports Regulator are vested in the Regulator;
- (c) all financial, administrative and other records of the Ports Regulator, including all relevant documents in the possession of that office immediately before the effective date, are transferred to the Regulator;
- (d) the term of office of any person serving as a member of the Board of the Ports Regulator immediately before the effective date expires; and
- (e) the Board of the Ports Regulator is dissolved.

#### **7. Interim Administrative Arrangements for Council**

- (1) From the effective date—
  - (a) the Minister must provide direct secretariat and other administrative support sufficient to enable the Council to perform its functions in terms of this Act; and
  - (b) the Council may supplement that support from its own resources; and
  - (c) at any time, the Council may request the Minister to adjust the formula for the sharing of revenue between the Regulator and the Council, contemplated in Section 49(2)(b), to provide the Council with adequate budget resources to finance its own secretariat and administrative functions, on the grounds that —
    - (i) the Council has sufficient workload to justify doing so, or
    - (ii) that the support provided by the Minister in terms of paragraph (a) is inadequate.
- (2) If the Minister accepts a request from the Council in terms of sub-item (1)(c), the Minister must issue a notice terminating the effect of this Item as from the beginning of the Council's next financial year.

## **MEMORANDUM ON THE OBJECTS OF THE ECONOMIC REGULATION OF TRANSPORT BILL**

### **1. POLICY REVIEW**

International comparisons indicate that transportation comprises an unacceptably high proportion of logistics costs in South Africa, and that the preconditions for efficiency and cost-effectiveness do not exist in the sector. In particular, the South African institutional framework of transportation is dominated by large state-owned companies, who have a very high degree of market power over either the infrastructure or services, which they operate.

Effective government oversight and economic regulation is needed to ensure technical, operational and pricing efficiency in the transport sector; and to reduce the costs and improve access to the sector. Whilst dedicated regulatory functions have been developed and implemented in the ports and aviation sectors, there is currently little economic regulation of road concessions, and little or no economic regulation in rail, despite the fact that competition in these sectors is currently limited. In ports terminals, while a dedicated regulatory structure exists, it is owned by the same entity which operates a number of terminals.

To achieve an efficient and cost-effective transport system in order to support economic growth and meet the country's social goals, it was considered imperative to consolidate, rationalize and, where necessary, redesign economic regulation in the transport sector into a single multi-modal regulator. By doing so, the Department of Transport aims to achieve a technically competent, independent and adequately resourced regulator which is well placed to improve economic outcomes in the transport sector.

### **2. PURPOSE OF BILL**

The purpose of the Bill, as set out in Section 3 is to promote the economic growth and welfare of South Africa by promoting an effective, efficient and productive transport sector, and towards that end, to establish two parallel, independent, but integrated regulatory agencies.

### **3. SUMMARY OF BILL**

#### **3.1 Integration with current laws**

The Bill proposes to work within the existing regulatory framework, with some adjustment.

The Bill will repeal certain provisions of selected Acts, primarily to bring an end to specialized sector regulators.

Beyond that, the Bill leaves substantive law governing specific sectors in place, but this Bill will over-ride those laws in case of any legislative procedural conflicts.

In the rail sector, no legislation has previously existed as regards the economic regulation of rail. For this reason, Chapter 2 dealing exclusively with the proposed regulatory structure for the rail sector has been included in the Bill. This is in contrast to the approaches adopted for aviation, maritime and road, where sector specific provisions are instead covered by amendments to existing legislation.

### **3.2 Scope of the Bill**

Section 4 of the Bill establishes a framework for the economic regulation of transport and defines the scope of the Bill. All markets, entities, facilities or services in the transport sector which were subject to economic regulation in terms of listed legislation will continue to be regulated. However, the Minister is also authorized to bring other private or public entities, markets, facilities or services within the scope of the Bill (or grant specific exemptions), on a case by case basis, should the conditions outlined in Section 4 of the Bill apply. This allows the scope of regulation to be tailored to address the economic problems that the transport market experiences, and to change over time as market realities do.

The Bill describes the regulatory instruments and procedures which are to be employed by the Regulator. This includes the ability of the Regulator to determine price controls and related service standards, provide access to certain sectors, collect regulatory and industry information, and to resolve disputes affecting all regulated entities.

### **3.3 Price controls**

Section 9 of the Bill gives the Regulator powers to regulate prices in the transport sector. Since a number of transport sectors will be regulated, and each will have different technical considerations as regards price setting, the Bill allows the Regulator discretion to tailor the price setting method used to the needs of each sector. In all cases, the goal of price regulation will be to ensure that normal levels of profit are achieved by regulated entities. In other words,

levels of profit which keep the regulated entity sustainable and continue to encourage investment, but which do not reflect monopolistic pricing or inefficiency in operations.

Item 2 of Schedule 2 provides that, if a sector is already subject to price regulation, such price regulation will remain in force until the Regulator publishes a new price control.

### **3.4 Access to infrastructure**

In areas of the transport market where infrastructure cannot be feasibly duplicated by competitors, access to infrastructure is an important tool which can facilitate competition. Chapter 2 introduces provisions governing access to rail infrastructure, and the amendments to the National Ports Act contained in Item 1 of Schedule 1, seek to strengthen the governance of infrastructure access in the ports sector.

### **3.5 Directed price control reduction**

Section 19 of the Bill makes provision for the implementation of directed price control reductions. Directed price control reductions are to be used by the Regulator as a punitive measure, and are not part of the normal price control methodology. A price control reduction immediately returns benefits to consumers while penalising operators, which in some circumstances will make it preferable as compared to issuing fines.

### **3.6 Finances**

A substantial body of academic research ties the success of economic regulation to regulatory independence, and links the achievement of regulatory independence to the manner in which the regulator is funded. Section 49 states that the cost of regulation should be borne by the regulated entities, in proportion to the actual cost of undertaking such regulation.

Section 4 requires that regulation should only be undertaken where economic problems exist that can be addressed by means of economic regulation, and Section 51(4) empowers the Minister to conduct five yearly reviews of the exercise of the functions and powers of the Regulator and of the Council, relative to the policy and purposes of the Act. These provisions seek to ensure that the scope of regulation is kept proportionate to the size of the economic problems in the market, and thus that the cost of regulation does not become disproportionate and excessive.

#### **4. REGULATORY INSTITUTIONS**

The Bill proposes the establishment of the Transport Economic Regulator, and the Transport Economic Council, each of which will be established as a state organ responsible to the Minister.

The Regulator will be the primary technical, administrative and enforcement regulator under the Act, responsible for carrying out education, research, price control approval, access request approval, investigation of complaints and enforcement of the Act. These powers will vest with the Executive Regulatory Panel established by Section 32, which will comprise the CEO and executive officers. The board of the Regulator will fulfil only a governance and oversight role.

The Council will be the primary adjudicative entity, reviewing decisions of the Regulator when an affected party applies for such a review; and reviewing the decisions of regulated entities when a user of a facility or service provided or licenced by a regulated entity considers that its rights have been adversely affected.

#### **5. ENFORCEMENT OF ACT**

The Bill gives the Regulator power to:

Investigate complaints and monitor regulated sectors, services and facilities for compliance.

Issue a compliance notice to a person or association whom the Regulator believes has engaged in prohibited conduct. It is an offence to fail to comply with a compliance order.

Refer alleged offences in terms of the Act to the National Prosecuting Authority.

The Courts are responsible for the adjudication of all matters relating to alleged offences in terms of the Act, interpretation of law, issuing of declaratory orders and consent orders.

The Bill makes provision for criminal and administrative sanctions. Criminal sanctions relate to offences and the administrative sanction of a directed price control reduction relates to prohibited conduct by a regulated entity.

The Regulator is given substantial powers in support of investigation, including the right to subpoena and the authority to enter and search under warrant. These powers are necessary in

order to achieve the goals of the legislation. The goal of economic regulation is to determine the right price for goods and services, which mirrors a competitive outcome. In order to do this, the Regulator needs to have access to detailed, high-quality information. If the Regulator is not provided with the powers needed to uncover this information, it is too easy for regulated entities to withhold data and thus prevent the achievement of good regulatory outcomes.

## **6. OTHER DEPARTMENTS AND BODIES CONSULTED**

The following departments, sector regulators, regulated entities and industry associations were consulted: Department of Public Enterprises, National Treasury, Companies and Intellectual Property Commission, Competition Commission, Public Investment Corporation, Independent Communications Authority of South Africa, National Energy Regulator of South Africa, Public Transport Regulator, Cross-Border Road Transport Agency, National Ports Authority, Ports Regulator, Air Traffic Navigation Services, Airports Company South Africa, Regulating Committees of the Air Traffic Navigation Services and Airports Company South Africa, Chamber of Mines, Transnet Freight Rail, Transnet Port Terminals, Richards Bay Coal Terminal, Passenger Rail Agency and South African National Roads Agency Limited.

## **7. CONSTITUTIONAL IMPLICATIONS**

The Bill allows for the co-ordination and harmonization of the functions of Regulatory Authorities and provincial and municipal authorities to ensure that any potential constitutional issues are identified and resolved amicably, given the fact that the national and provincial governments have concurrent legislative competence in respect of some aspects of transportation.

## **8. COMMUNICATION IMPLICATIONS**

The Bill will be published in the *Gazette* for public comment and further consultations will be held with other government departments, sector regulators, regulated entities, industry associations, consumer groups, professional associations, trade unions and any other interested persons.

## 9. PARLIAMENTARY PROCEDURE

The Department is of the opinion that this Bill must be dealt with in accordance with the procedure prescribed by Section 76 of the Constitution, since it falls within a functional area listed in Schedule 4 to the Constitution.

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