



Portfolio Committee on Home Affairs

Attention: Mr. Eddy Mathonsi

Per Email: [emathonsi@parliament.gov.za](mailto:emathonsi@parliament.gov.za)

Dear Sir/Madam,

**RE: COMMENTS: BORDER MANGEMENT AUTHORITY Bill, 2016**

1. Transnet SOC Ltd ("Transnet") herein provides comments on the Border Management Authority Bill, 2016 hereinafter referred to as (the "Bill"), as requested by the Portfolio Committee on Home Affairs.

**GENERAL COMMENTS:**

2. Transnet fully supports the establishment of the Authority through the Bill. Chapter 1 of the Bill provides for definitions.
3. **"Border law enforcement area"** means, in respect of
  - (a) the land border, a distance of 10 kilometres or any reasonable distance inside the internationally recognised borders of the Republic; and
  - (b) the maritime borders, a distance of 10 kilometres or any reasonable distance on the landward side of the baselines extending seaward to the outer limit of the Exclusive Economic Zone as defined in the Maritime Zones Act, 1994.
4. **"Port of entry"** means a port of entry designated by the Minister of Home Affairs in terms of section 9A of the Immigration Act, 2002 and includes any port, point or place of entry or exit determined under any other legislation or other port, point or place of entry or exit approved by the Minister in terms of section 31 of the Bill.

Transnet SOC Ltd  
Registration Number  
1990/000900/30

Carlton Centre  
150 Commissioner  
Street  
Johannesburg  
2001

P.O. Box 72501  
Parkview, Johannesburg  
South Africa, 2122  
T +27 11 308 3001  
F +27 11 308 2638

**Directors:** LC Mabaso (Chairperson) SI Gama\* (Group Chief Executive) Y Forbes GJ Mahlalela PEB Mathekga ZA Nagdee VM Nkonyane SD Shane  
BG Stagman PG Williams GJ Pita\* (Group Chief Financial Officer)  
\*Executive

Group Company Secretary: NE Khumalo

[www.transnet.net](http://www.transnet.net)

5. **“Vehicle”** includes any vessel, aircraft, locomotive, railway carriage, conveyance, container or receptacle or any other means of transport, whether or not used for the purpose of transporting goods or persons.
6. Chapter 2 provides for the scope of application of the Bill. It provides that the Authority will only exercise its border law enforcement functions within the “border law enforcement area” and at a “port of entry”.
7. It is clear that the Authority will only exercise its statutory functions within the confine of the “border law enforcement area” and at a “port of entry” as defined.
8. The Bill will have unintended consequences on the operations of Transnet Freight Rail (“TFR”), an Operating Division of Transnet SOC Ltd, in that chapter 6 of the Bill provides that the officer(s) to be appointed by the Authority will have powers to conduct search and seizure with or without a warrant. This will include powers to search any vehicle (this includes vessels, railway carriages and locomotives) within the border law enforcement area or at a port of entry. During a routine inspection an officer may, without a warrant order any driver of a “vehicle” to stop. This means that the drivers of locomotives may be ordered to stop within the border law enforcement area and at a port of entry as defined.
9. TFR is a freight rail logistics entity and its business model includes the transportation of goods through the South African borders by train (border law enforcement area or at port of entry) which will be the area where the Authority will have jurisdiction to exercise its functions.
10. It is important to note that trains may only stop at a TFR designated railway station, siding or under the instruction from the TFR Centralised Train Control department for operational and safety related reason. It is further important to note that for safety reasons, it is not advisable to set up a checkpoint within the border law enforcement area or at a port of entry since there are no service roads leading to the railway reserves which the “officer(s)” will use to board a train for inspection purposes. The train and personnel will also be entirely exposed to risks since there will be no security. It also presents operational challenges should a train be required to stop in a section (i.e.

between stations or sidings) since the topography of the area will affect the safety of the train whilst stationary and when it has to re-commence its journey.

11. Currently there is no railway station, siding, or service road leading to a railway line next to the designated port of entry or border enforcement area as defined. Transnet stations (last station before the border) are more than 10 kilometres away from the port of entry, with the exception of the Komatipoort station. However, the latter station has overhead track equipment which is used to transmit electrical energy to the locomotives. For safety reasons, it is not allowed for a person to climb on to the wagons since the person may come into contact with the electrical overhead lines.
12. It is for the above reasons that Transnet is of the view that it may be impractical for an officer to stop a train/locomotive and conduct inspections as contemplated in clause 20(1)(b)(i) of the Bill. Transnet recommends that the inspection of a train/locomotive be conducted at the last TFR designated railway station or siding before reaching the border law enforcement area or port of entry.

#### **SPECIFIC COMMENTS:**

##### **13. Ad the definition of "airspace"**

- 13.1. The concept of "space" cannot be equated with the notion of a border or boundary.
- 13.2. Consequently, it is proposed that this definition be adjusted to read as follows:

"airspace" means the space within the outer limits of the internationally recognised airspace of the Republic.

##### **13.3. Ad the definition of "border law enforcement area"**

- 13.4. "border law enforcement area" means, in respect of:

(a) the land border, distance of 10 kilometres or any reasonable distance inside the internationally recognised borders of the Republic; and

(b) the maritime borders, distance of 10 kilometres or any reasonable distance on the landward side of the baselines extending seaward to the outer limit of the Exclusive Economic Zone as defined in the Maritime Zones Act, 1994.

13.5. The above definition would have the unintended effect of limiting the jurisdiction of the Authority. In terms of clause 40 of the Bill the current ports, points and places of entry or exit will remain. It follows therefore that were such ports, points and places are not located in close proximity of the Republic's borders (the definition refers to 10km), the Authority would have no jurisdiction.

#### 14. **Ad clauses 31 and 40**

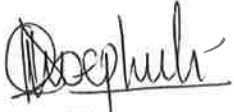
14.1. From an Administrative Law perspective, these two clauses may be irreconcilable with each other. In terms of Administrative Law, the power to issue a determination would normally include the power to change, amend or withdraw such determination where the *functus officio* principle does not apply. In the current instance the power to determine a port, point or place of entry or exit would include the power to change or withdraw such determination.

14.2. Where the powers to determine a port, point or place of entry or exit under the laws referred to in clause 40 of the Bill do not reside with the Minister of Home Affairs, the power of the Minister of Home Affairs to take charge of this process in terms of the Bill and even withdraw or cancel a designation would be undermining the "original" statutory powers of the authority empowered with these powers under the laws referred to in clause 40.

14.3. Consequently, there appears to be a need to have proper statutory alignment between laws dealing with the determination of ports, points and places of entry or exit, therefore making provision for a consultation requirement in the Bill does not resolve the matter. Transnet recommends that the above clauses should be reconsidered and consideration be given to align the Bill with the regulatory requirements referred to in clause 40.

15. We further kindly request an opportunity for oral submission in order to re-iterate our comments. We thank you for the opportunity to comment.

Kind regards



Disebo Moephuli

Chief Corporate and Regulatory Officer

Date: 8/09/2016.