

ECONOMIC REGULATION OF TRANSPORT BILL

[B1-2020]

A SUBMISSION BY Dr DOUGLAS BLACKMUR ON CERTAIN PROVISIONS OF THE BILL TO THE HONOURABLE Mr M J ZWANE MP, CHAIR of the PORTFOLIO COMMITTEE on TRANSPORT, PARLIAMENT OF THE REPUBLIC of SOUTH AFRICA

30 JULY 2020

INTRODUCTION

This submission is a response to the call for public submissions on the Economic Regulation of Transport Bill (the Bill) which were invited by the Portfolio Committee on Transport.

I have served on the foundation Board of the Ports Regulator of South Africa, chaired its Regulatory Committee and was a member of the Human Resources Committee. I have also served on the Board of the Ports Corporation of Queensland in Australia (and its Strategic Planning Committee).

Operational regulatory experience has been acquired, for example, as the Chief Executive Officer of the New Zealand Qualifications Authority.

The Committee is respectfully asked to consider the following comments on some of the provisions of the Bill.

In general terms, I congratulate the Department, Government, the Committee, and the Parliament on a progressive piece of proposed legislation. It embraces, by the same token, a relatively complex regulatory model that will require sensitive implementation.

SPECIFIC COMMENTS

- 1. The definition of “economic regulation” is quite limited and this could make the achievement of the objects of the legislation**

more difficult than necessary. The Committee might consider examining the regulatory literature to establish if there is a better definition of “economic regulation” that is nevertheless consistent with the Bill’s objectives.

2. Should the Regulator have power to address environmental issues associated with transport? Ships, for example, may pollute costal waters by discharging ballast water into the sea; air and noise pollution may arise from the activities of aircraft and road/railway vehicles. The Committee may wish to consider if the powers of the Regulator should include dealing with such matters.
3. The definition of a “market” refers to a “place”. Some confusion could arise if this is interpreted to mean a physical place. Many modern markets are, of course, electronic markets.
4. A definition of “oversight” should be added to the list of Definitions. Oversight is one of the Board’s responsibilities, and it might be wise to define this power clearly.
5. Section 8.1: the Committee might consider if negotiated agreements between access seekers and infrastructure owners should nevertheless be subjected to a public interest test by the Regulator. Agreements between parties may be against the public interest in some cases, and there needs to be a mechanism to amend these.
6. Section 24.1: the list of those entitled to appear at a hearing might be expanded to include Amicus Curiae attendance.
7. Section 30 (8): is there a need for the appointment of a Deputy Chair as well?
8. Section 30: Governance of the Economic Regulator: the inclusion of a statement of best practice corporate governance principles in this Section may improve the standard of corporate governance at the Board, and will make clear Parliament’s expectations regarding the Board’s performance.
9. The Committee may wish to include a provision in the Bill for regular (5 yearly?) evaluations of the performance of the Regulator including public submissions from interested parties.
10. Section 30: is the Board empowered to establish various sub-committees of the Board? (possibly covered by Section 34.6?).
11. Section 30: The Chair of the Board ought to be given a casting vote.
12. The Bill separates the governance of the Regulator from certain decision-making processes that are reserved to the Executive Regulatory Panel (ERP) (Section 30.10. (a)). Section

30.9.(d) empowers the Board to monitor compliance by the ERP “with the procedures for the consideration of regulatory matters by the Executive Regulatory Panel”. These procedures are established by the Board (but there is a potential clash here with Section 34.4 (c)).

13. As well as these procedures, the Board might also be empowered to determine the regulatory principles which are to underpin the deliberations and decisions of the ERP (the precedent here is that the Ports Regulator of South Africa decided such principles which added to the transparency of regulatory decisions. See: Gazette. Government Notices. Department of Transport. 6 August 2009, number 824. Ports Regulator Regulatory Principles).
14. Although separating governance and management/policy execution is a commendable principle, some tensions could arise between Section 30.9 (d) and Section 30.10 (a). If the Board decided that the ERP had made a regulatory determination that was not in accordance with the Board’s “procedures for the determination of regulatory matters”, then the Board would necessarily have “to interfere” in this decision(s), perhaps by reporting the matter to the Minister.
15. Given these considerations, it might be advisable to include the Chair of the Board as a member of ERP: Section 34.4 (a). This could facilitate effective communication, and a smooth relationship, between the Board and the ERP.
16. The Committee may also wish to consider if Section 38 (h) might be problematic. Section 38 (h) provides that the Regulator will “determine price controls” (presumably the function of the Economic Regulatory Panel) and that “for that purpose, may determine methods of price regulation” (the function of the Board).
17. Such divided responsibility may cause frictions especially if the ERP claimed jurisdiction over the determination of “methods of price control”.
18. Section 34.4 (c) (iv) requires the ERP to review the impact of its regulatory decisions. This could be usefully extended to require ERP also to conduct and publish ex ante Regulatory Impact Statements regarding its decisions.
19. The ERP is an extremely powerful body. The Committee might like to satisfy itself whether the accountability processes for the ERP as provided in the Bill are adequate. Can, for example, the ERP be sued in the courts? Is it accountable

directly to the Minister? Does it issue a separate Annual Report?

20. Technical experts will have little difficulty in appreciating the distinction in the Bill between “the Board of the Regulator” and “the Economic Regulatory Panel”. Sections 29 (3 and 4), and 30.10 (a) are explicit. But industry, commerce and the wider community might be confused by the use of the term “the Regulator” in the Bill when reference is effectively being made to “the Economic Regulatory Panel”. Some people, moreover, could find it difficult to appreciate that the Board does not ultimately govern all of the Regulator’s activities. A detailed explanation might ultimately be provided to the public which amplifies the comments made on this matter in the Memorandum on the Objects of the Economic Regulation of Transport Bill, 2020.

Submitted with respect for consideration.

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