Ms Portia Derby, Group Chief Executive

TRANSNET

Our Ref No: PD/25579

Chairperson of Parliament Portfolio committee on Transport
Parliament of South Africa
90 Plein Street
Cape Town
8000

E-mail: vcarelse@parliament.gov.za

Dear Ms.Carelse

ECONOMIC REGULATION OF TRANSPORT BILL_2020

1. Transnet SOC Ltd ("Transnet") welcomes the opportunity to submit its comments on the ERT Bill. In addition, Transnet accepts the invitation to make a verbal presentation to the Committee.

2. In response to the Department of Transport (DOT)'s publications for public comment on the ERT Bill, Transnet has been submitting written comments to the DOT since the inception of the Bill and also had initial engagements at the beginning of this process.

3. With these iterations, the company had made numerous requests to engage the DOT with a view to obtain alignment in the finalisation of the ERT Bill. Transnet supports the establishment of the Economic Regulator of Transport and it is the company's considered view that the development of such an important legislative tool for the advancement of the country's transport system, which serves as the backbone of the economy, warranted more than just written comments over the years of its development.

4. More robust engagements would have ensured better alignment in the regulatory approaches that are provided for in the Bill, taking into consideration lessons learnt in the current regulatory experiences and elsewhere in the world. It is unfortunate that in the past five years, despite its numerous endeavours, the request to engage with the DOT has been futile.

5. Transnet views the ERT Bill as a means by which the DOT intends to consolidate several Acts in the transport sector and the regulation of the transport sector, covering the provision of rail, ports, air and road into a single Act.

6. Therefore, Transnet recommends that the ERT Bill should endeavor to maintain the state of law applicable within the various Economic Regulators who are providing oversight to regulated entities in the current context and also simplify the statutory landscape.

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7. The company welcomes the concept of economic regulation of access and pricing of access fees in rail infrastructure. However, it is important to caution against taking decisions in a situation of imperfect information around the appropriate regulatory models for economic regulation, which are supposed to establish accountability for stewardship of the infrastructure whilst allowing full recovery of operating costs, depreciation for asset renewal and reasonable return on capital invested.

8. In order to ensure appropriate application of economic regulation Transnet suggests that the risks and impact of price regulation for haulage services be reviewed alongside the national strategic imperative of achieving the road to rail shift, the improvement of the country's global competitiveness and the sustainability of the rail sector.

9. In light of the aforegoing, Transnet hereby submits comments on the Economic Regulation of Transport Bill, 2020 "Annexure A" and is looking forward to present to and apprise the Portfolio Committee on its comprehensive views.

Yours sincerely

Portia Derby
Group Chief Executive
Date: 03/08/2020

COMMENTS ON THE ECONOMIC REGULATION OF TRANSPORT BILL_2020

Contents

PART A: STRATEGIC CONSIDERATIONS FOR THE ERT BILL

1. Purpose and Application of the ERT Bill

1.1 Single framework of Economic Regulation of Transport

1.1.1 The ERT Bill aims 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.

1.1.2 Transnet has always expressed its support for the establishment of a single Transport Economic Regulator as a mechanism to better understand interdependencies of different transport modes and services across the supply chain. Transnet would like to provide further comments to contribute to the finalization of this Bill with a view to ensure clarity on the scope and approach for the economic regulation of the different modes of transport within a single regulatory framework.

1.1.3 Transnet views the ERT Bill as a means by which DOT intends to consolidate several Acts in the transport sector and the regulation of the transport sector, covering the provision of rail, ports, air and road into a single Act. Therefore, Transnet recommends that the ERT Bill should endeavor to maintain the state of law applicable within the various Economic Regulators who are providing oversight to regulated entities in the current context and also simplify the statutory landscape.

1.2 Objectives governing the Bill

1.2.1 It is recommended that whilst there is no overarching policy specifically targeted to all transport sectors (i.e. rail, road, civil aviation and ports) to be regulated by the envisaged Act, a Preamble is required to declare the intent of this Bill and outline the broad principles contained in the particular legislation. In this regard, the preamble should define the scope of the policy framework and guidelines underpinning the establishment of the Regulator. A Preamble is important to set

the objective of the ERT Bill and provide clarity on how the different regulatory instruments of access, price, efficiencies, etc. will be applied for the different modes of transport.

1.2.2 It is common law that the preamble states the circumstance of, the background to and the reasons for the legislation. Therefore, Transnet recommends that the preamble should be included in the Bill, as it will assist with the interpretation of the envisaged Act.

2. Economic Regulation of Transport Services

2.1 Instruments of Economic Regulation

2.1.1 The Bill overlaps considerably with the provisions of the Competition Commission who has extensive powers to investigate any reported/perceived competition irregularities in areas where there are market dominance, specifically in areas where market share is above 70%. The ERT Bill should focus on implementing regulatory instruments in network industries ex ante (prior to implementation) whilst the Competition Commission applies these instruments ex post (after the conduct) in competitive markets. Whilst regulatory concurrence is possible, the economic regulatory approach must be consistent with the provisions of the Competition Act and circumstances of market intervention to avoid the risk of inconsistencies.

2.1.2 In view of the aims of this Bill to improve the overall efficiency and effectiveness of the economic regulation of transport, Transnet recommends that the Bill be structured around the regulatory instruments, i.e. access and access fee regulation, price regulation for transport services, quality of service regulation, provision of information, etc. and that it makes provision for and address how each regulatory instrument will be applied to each mode of transport. The methodologies (e.g., for access regulation, licensing, concessioning etc. will be the applicable methods and for access fee regulation, a cost-plus methodology which provides for the recovery of a reasonable return) that will be applied for each regulatory instrument must also be specified. This will provide regulatory certainty and address any ambiguities that may arise given that the Bill does not specify

how regulation will be carried out. Each regulatory instrument is likely to be applied differently per mode, depending on whether the markets to be regulated are monopolistic or competitive, whether government would be providing funding or not for certain markets.

2.1.3 From a regulatory consistency perspective, it is recommended that the Bill be brought into line with other network utility areas, such as electricity, pipelines, ports, aviation and telecoms. In each of these areas there are clear regulatory provisions governing the determination of tariffs in situations where there is the partial or complete absence of a competitive market pricing mechanism.

2.1.4 The regulation of network industries, such as those described above typically carry the challenge of the need for implicit cross-subsidies from one part of the network to another. For telecoms, airports and electricity, access to more remote areas or using infrastructure that has lower volumes is cross-subsidised by those parts of the network which carry higher volumes of traffic. This is demonstrated by way of an example for electricity, where the tariff is the same for a customer in the Northern Cape and Mpumalanga, even though the cost of serving a Mpumalanga customer where most electricity is generated is considerably cheaper. From this perspective, it is not possible or prudent to regulate only parts of the railway network where there is some pursued monopoly pricing, without considering the network costs and tariffs as a whole. From this perceptive, the economic concepts of 'economies of scale' (lower unit costs to serve incrementally more volume) and 'economies of scope' (the cost of serving of serving a broad range of geographically dispersed customers) need to be implicitly brought into the regulatory framework. These concepts are already contained in the regulatory provisions for aviation, port and electricity tariff determination.

2.1.5 The cross-subsidy requirements of achieving the goals of road to rail migration also need to be considered in the regulatory provisions. In many parts of the railway network Transnet is forced to set its own price at rates offered in the road freight sector, even though this is below the long-run cost of delivering these railway services.

2.1.6 The envisaged White Paper on Transport Policy (after the Review process is completed) and the White Paper on Rail Policy (currently still in Draft form) should be very specific as to which markets will be subject to price regulation and which will not before the ERT Bill can determine the scope of price regulation for regulated entities. Transnet is a monopoly freight rail national infrastructure owner and operates in different markets for the haulage of freight, where it is dominant in the local market but not in the global market (e.g. export commodity lines), while it operates in competitive markets locally (e.g. general freight business). Price regulation by an economic regulator should not be applicable in competitive markets, i.e. transport haulage services for commodities, given that it would negatively impact the competiveness of the regulated entity. Furthermore, the broader legislative environment enables the Competition Commission to assess and remedy anti-competitive behavior in competitive markets.

2.1.7 In view of the above, Transnet will further, propose amendments to the definition of transport sector to mean "*shipping and ports, aviation and land transport which include rail and road transport*". In addition, as an illustration, the Ports Act rightfully provides for the instrument of regulation, which are separated into different chapters. For instances, the provision of port services, port facilities and use of land is provided in a separate chapter from other regulatory instruments such as those of a commercial nature; and those of a safety nature, and these regulatory authorities should be allowed to continue to regulate within the specific transport modes.

2.2 Economic Regulation of Access

2.2.1 In order to give effect to the objective of this Bill, Chapter 2 should make provision for the regulation of access and access fees in other modes of transport, i.e. air, road and sea transport and not only focus on rail.

2.2.2 Given the emphasis in the ERT Bill on access to rail infrastructure, it is suggested that the economic regulation of rail infrastructure will proceed in the absence of specific enabling legislation and rail policy, which underlines the interactions and interoperability between rail infrastructure and operations. There are risks associated with this in that aspects of the rail business have been found to be

more efficient and effective when managed as a single vertically integrated entity, and the policy analysis may well promote a mixed model of a vertically integrated railway system with an accounting separation of infrastructure and operations, as already proposed by the Draft White Paper on Rail Policy. Transnet has made significant progress in separating the costs and activities between infrastructure and operations. Furthermore, Transnet would like to suggest an engagement with the Department of Transport ("DoT"), Department of Public Enterprises, National Treasury and Department of Trade and Industry to provide progress in this regard and also conduct an exercise to review Transnet's pricing system within the context of its costing model across the company's operating divisions.

2.2.3 It seems unjustifiable to set in place a regular mechanism in the complete absence of policy. Rail policy should clarify and pronounce what the role of rail is, how it is organised and priced, how the railway network issues will be addressed, what the policy is in respect of road to rail migration and how this will this be achieved, how infrastructure and operations will be treated, the interface with ports and what the national policy position is in respect of the future role of Transnet. All of these policy aspects need to be considered and finalised in order to guide how economic regulation will be applied in a sustainable manner instead of considering price regulation selectively, only in areas where there is perceived monopoly. In the absence of rail policy articulating the treatment of the above-mentioned issues, the ERT Bill is premature. Therefore, Parliament needs to ensure that the resultant risks arising from the provisions of the Bill are mitigated before the Bill is approved.

2.2.4 It is therefore strongly recommended that the rail policy process and existing investigations into rail economic regulation be concluded ahead of implementing the economic regulation of rail infrastructure as contemplated. It is important to note that whilst different countries may adopt the same set of reforms, they may differ in terms of their implementation thereof, as these may depend on the policy choices of specific countries, and that these policy choices in turn are to a large extent a function of country-specific idiosyncrasies.

2.2.5 Transnet is supportive of the concept of economic regulation of access and access fees in the rail infrastructure, but cautions against acting in a situation of imperfect knowledge around the appropriate regulatory models for economic regulation,

which are supposed to establish accountability for stewardship of the infrastructure whilst allowing full recovery of operating costs, depreciation for asset renewal and reasonable return on capital invested. In addition Transnet notes the absence of the provisions guiding the regulatory frameworks such as access pricing setting and management under "negotiate-arbitrate" model. This ensures commercially negotiated outcomes on price and other non-price terms of access.

2.2.6 Whilst Transnet agrees with the concept of the economic regulation of access and access fees to the rail infrastructure, the company submits that the application of the ERT Bill with regard to "Access to Rail Infrastructure" should be informed by the policy statements in the final published White Paper on Transport Policy (post the review process) and more even more specifically on the White Paper on Rail Policy (once finalized). Transnet submits that, due to the complexity of the sector, and the potential harm that can be done to a sub-sector of the industry if a total integrated network systems ('economies of scope') approach is not taken, the access framework should be determined through policy, rather than directly through the ERT Bill. The ERT Bill should then, on the basis of policy, establish how the regulation of those access regimes and arrangements would be determined. Therefore, Transnet recommends that Chapter 2 should make provision for the review of the Bill / Act once the access framework has been adopted via Policy to ensure that there is consistency between the access framework and how the regulation is applied. Notwithstanding the above comment with regard to Chapter 2, Transnet has provided comments on the rest of the Chapter.

2.3 Economic Regulation of Pricing

2.3.1 Chapter 3 of the Bill provides for economic regulation of transport facilities and services. Clause 11 provides that price control of regulated entities may comprise of amongst others, a schedule of tariffs, charges, fees, tolls or other amounts that may be imposed by the entity for the provision of transport services.

2.3.2 Whilst Transnet supports the economic regulation of access pricing, the company proposes that the economic regulation of pricing for rail haulage be reconsidered

as a matter of last resort as it may have unintended consequences and further reduce the country's competitiveness in relation to commodities destined for global markets. Given the different levels of competitive constraint experienced in the transportation of various commodities destined in both local and global markets, to avoid the inappropriate application of economic regulation Transnet suggests that the risk and impact of price regulation should be investigated first. This is because of the fact that rail is optimized when a network-pricing model is used and such models have cross subsidization as an innate characteristic. This will ensure that appropriate interventions are identified and implemented to address concerns around pricing for the transportation of various commodities to secure the sustainability of rail services.

2.3.3 A key strategic objective of Government and Transnet is to increase the movement of freight from road to rail, as this is naturally efficient for long distances; and in order to alleviate the continuous damage being caused to South African roads; and to mitigate against environmental and other externality costs. This issue is also acknowledged in Chapter 4 of the National Development Plan, 2030. The CO2 emissions from rail transport are 3.5 times lower per tonne-kilometer compared to road transport in accordance with the European Environment Agency. Furthermore, in 2012, an environmental costs study was commissioned locally for Transnet, indicating that road externality costs are estimated at approximately R33.44 billion, compared to R1.45 billion in rail externality costs. The externality cost for road constitutes 17% of the total road cost whereas rail externality cost only makes up 7% of total rail cost. Rail as a more sustainable method of transport could help reduce the costs associated with road congestion and cut the number of transport fatalities. TFR competes with road hauliers for land freight transport market share, with road hauliers having in excess of 75% of the total land freight transport market share, particularly on general freight corridors.

2.3.4 This modal imbalance is as a result of amongst other things, the deregulation of road transport and the direct government investments in road infrastructure, whereas rail infrastructure is self-funded. Funding from the Fiscus may be considered as borrowing from the general public contrary to funding which comes with market terms and therefore higher rates of return and resultant higher rail pricing. When customers are regularly comparing the two when deciding which

mode of transport to use, affordability is the determining factor. This contributes to the competitive edge that road has over rail even over longer distances. Rail freight must be made economically attractive so that the policy objectives of road to rail can be achieved. Therefore policy and regulatory interventions should provide an enabling environment to address the road/rail imbalance and support the migration of traffic from road to rail instead of constraining the competitiveness of rail further.

2.3.5 It is also worth noting that in almost all instances in the general freight market, commercial road freight operators are a dominant mode and are the "price maker", while Transnet is a "price taker" and furthermore is often required to respond very quickly to market opportunities.

2.3.6 In view of the fact that commercial road freight operators have market power when it comes to general freight transport since the deregulation, Transnet is of the view that price regulation of railway services is not appropriate and will defeat the strategic objectives of moving rail friendly cargo from road to rail. Considering the above, and recognizing that there is fierce competition between the road and rail industries, price regulation will have unintended consequences and would not be an appropriate regulatory instrument to address any existing or potential market failures. In this instance, the principles of competition policy would apply under the auspices of the Competition Act, where the Competition Commission has jurisdiction to address any possible anticompetitive behavior from both road and rail operators.

2.3.7 An argument could be made that there is no or very little competition between rail and road on the transportation of the Heavy Haul Iron Ore and Coal Lines that serve a relatively small number of customers with few other transport options for these customers locally; and therefore these markets need to be price regulated. Whilst that may be the case, the pricing for the transportation of these commodities contribute to their competitiveness in their global destination markets. The price set by Transnet for the these commodities is a function of other prices charged for the same, or similar, competing Heavy Haul Lines, elsewhere in the world.

2.3.8 The Heavy Haul lines customers are multi-national mining customers that have global operations and have a choice to sell these commodities from their mining operations in other parts of the world in South Africa, inclusive of logistics costs, is too expensive to buyers of the commodities. This serves as a deterrent to monopoly pricing that result in welfare loss for heavy haul lines mining customers. As a result, this establishes market contestability, and competition for the market, from the competitive Global Supply Chains beyond the South Africa's borders. In fact, the Heavy haul Lines typifies a cost-efficient business arrangement whereby additional economic regulation through price controls will add little value, if any.

2.3.9 It is Transnet's view that price regulation of rail services is not an appropriate regulatory instrument since these freight operations take place within local and global competitive markets. Under these competitive circumstances, the monitoring of any excessive or discriminatory pricing could be undertaken by the Competition Commission. However, this may also have unintended consequences considering that market enquiries would focus on a relevant market instead of considering the entire freight system view. The effects of price regulation and competition regulation in the absence of a concerted policy approach to support the advancement of rail may result in the further loss of freight that has already been captured in rail, back to road and, also making it difficult to recapture lost volumes. Any decisions aimed at addressing the costing and pricing of rail services should be aimed at promoting government's strategic imperative to move traffic from road to rail and promoting South Africa's global competitiveness.

2.4 Economic Oversight of Regulated Entities

2.4.1 The NDP provides for the reduction of the cost of transport and logistics in the country. The SEIAS requires that the cost of regulation be considered when new legislation is proposed. It is worth noting that the President during the 2020 SONA address emphasized that the cost of doing business in the country must be reduced. Furthermore, the Transnet Shareholder Compact 2020 indicates: *"(6.2) Transnet's key role is to assist in lowering the cost of doing business in South Africa, enabling economic growth and security of supply through providing appropriate ports, rail and pipeline infrastructure as well as operations in a cost effective and efficient manner within acceptable benchmark standards. (6.3) The*

Board shall ensure that Transnet and its subsidiaries comply with the provisions of the Companies Act, the PFMA, the King Code on Corporate Governance and any other legislation, including applicable regulations and guidelines issued by the National Treasury and or the Shareholder Representative."

2.4.2 There is a need to establish a sustainable funding plan for the Regulator. The current arrangement of fees determined on an annual basis without an appropriate methodology results in excessive fees, which become the burden of the regulated entities and ultimately passed on to customers. Transnet recommends a consultative process of establishing the funding plan of the Regulator, which is premised on the objective to lower the cost of doing business.

2.4.3 Transnet is concerned with the rising cost of economic regulation. As part of a broader process of improving the efficiency and effectiveness of transport economic regulation, it is suggested that the Bill make as one of its objectives, reducing the cost of economic regulation. Transnet also recommends that a cost sharing arrangement between regulated entities and government should be developed to provide an incentive for both parties to ensure that the costs of the economic regulator are optimized and that specific provisions are made in the Bill to ensure that the economic regulator's costs are subject to appropriate scrutiny and challenge. An appropriate methodology for determining the funding costs of the Regulator must be determined and it must also be borne in mind that these costs are passed-through to customers.

2.4.4 The ERT Bill leaves the sole function of Regulatory accounting and disclosure requirements in the hands of the Regulator in terms of defining and developing these frameworks. These frameworks include the criteria to be used for the valuation and allocation of assets by regulated entities. The regulated entities manage complex institutions with multiple measures for investments needs, costs and performance, among other factors. The process of developing these frameworks need to be consultative with the principles governing their development being pronounced in the ERT Bill to minimize bias discretion on the part of the Regulator and to ensure regulatory certainty and financial sustainability.

2.4.5 The Regulator should strive to attain the principles of capital maintenance, which is premised on full cost recovery plus the cost of capital maintenance. Transnet is already struggling to sustainably maintain the cost of providing the railway network in a sustainable condition. Price regulation would worsen Transnet's maintenance challenge.

2.5 Sub-delegation of powers from the Legislature to the Minister

2.5.1 The Minister is provided with wide powers in the ERT Bill by Parliament. The Minister in consultation with the Regulator may declare that the ERT Bill can apply to any market. A sub delegation of powers from a legislature to a Minister is unusual and may create a window for abuse of power without the necessary checks and balances that would be in place had the Legislature retained this authority.

2.5.2 In existing economic transport legislation, the Parliament retains their authority and regulatory powers. Parliament has the original authority to regulate the ports and energy environment, however in the ERT Bill, Parliament is abdicating their role to the Minister. This is unusual and may be unlawful for Parliament to provide such extensive powers to a cabinet member.

PART B: DETAILED COMMENTARY ON BILL

ARRANGEMENT OF SECTIONS

CHAPTER 1

1. Interpretation, Purpose and Application

Part A

Interpretation

1.1 Definitions

1.1.1 **"Access agreement"**

It appears on the reading of the above definition that the access agreement is an agreement that will be concluded by an access seeker and an infrastructure or resource owner. Therefore, it is unclear as to whether an access seeker is required to enter into another type of agreement with the facility owner or if the envisaged Act will not apply to facilities. Transnet recommends that this issue be clarified since the ERT Bill makes reference to the phrase "*infrastructure, resource or facility*" in different clauses of the Bill. For example, the definition of access means the use of "*infrastructure, a facility or a resource by an access seeker to provide goods or services to customers of that access seeker*". This implies that there will be an agreement that ought to be concluded between the access seeker and the facility owner. Consideration may be given for the above definition to read as follows:

"access agreement" *means an agreement between an access seeker and an infrastructure, resource or facility 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, excluding any agreement regarding the safe operation of such access that is required by safety legislation;"*

1.1.2 **"Economic regulation"**

"means the regulation of markets, entities, facilities or services within the transport sector by determining—

(a) the price control for access to facilities or for services;
(b) access to facilities or services; and
(c) service levels and service conditions;"

1.1.2.1 It appears on the reading of the above definition that it is not aligned to other clauses of the ERT Bill and seeks to extend the ambit of what true economic regulation seeks to achieve, which is to ensure in monopolistic market structures there is economic efficiency thus regulating decisions over price as well as access. Chapter 2 of the Bill provides for access to rail infrastructure and the Regulator will determine the cost of access to the rail infrastructure or facilities, however the definition of economic regulation appears to be limited to "facilities and services". This will in turn undermine and limit the scope of the envisaged Act, therefore Transnet recommends that the definition of economic regulation should be reviewed and include all the activities or sectors that the Bill seeks to regulate.

1.1.3 **"Market"**

1.1.3.1 Market is defined to mean any place where exchange for goods and services at a certain value exist. Transnet is of the view that the Bill defines the phrase "*market*" incorrectly, whilst for comparison purposes "*market*" is not defined in the enabling legislation that manages competition, i.e. the Competition Act, 1998. This Act only defines "*market power*" and "*market inquiry*" but does not define a market. Market definition is one of the most fundamental concepts underpinning essentially all competition policy and economic regulation issues.

1.1.3.2 The definition of the market in the Bill suggests that an institution, a procedure, a social relationship or a process constitutes a market. These elements cannot be defined as a market, yet they may form part of a market. Often there is temptation to conclude that the existence of one firm (or very few firms) in a

market, leads to welfare loss, then competition policy should try to increase the number of firms to operate in a particular market. Such a conclusion would not be correct as keeping less efficient firms artificially in a market would distort allocation of resources and reduce economies of scale, thus reducing welfare.

1.1.3.3 Competition policy is not about maximising the number of firms but defending market competition in order to increase welfare. The infrastructure industries such as railways are unique and are mostly state owned, as they tend to be cumbersome and exhibit economies of density (i.e. declining marginal costs as the intensity of use increases). The elements of a natural monopoly normally endow infrastructure industries with the elements of a natural monopoly hence economic regulation and competition policy do not concern themselves with the existence of monopolies, but are rather concerned with ineffective monopolies in the markets and the abuse of power by dominant firms.

1.1.3.4 With reference to definitions of a market as suggested to by the EU Commission and relevant literature, a relevant market it defined on a case-by-case basis. A market is defined in terms of both the product and geographic dimensions as follows:

1.1.3.4.1 a relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer by reason of the products' characteristics, their prices and their intended use; and

1.1.3.4.2 a relevant geographic market comprises the area in which the firms concerned are involved in the supply of products or services and in which the conditions of competition are sufficiently homogeneous.

1.1.3.5 The definition of "market" in the Bill as indicated above is not consistent with these internationally accepted principles. It is therefore recommended that this definition be aligned with international best practice.

1.1.3.6 The land freight transport (including rail and road services) consists of different markets, with varying levels of competition. For example, using the product

and geographical dimensions of a market, it should be determined that the General Freight Business is a separate market from other commodities like heavy haul coal and iron ores lines. In essence, markets are not defined by modes of transport, but by service offering and geographic location. An illustration is made of domestic coal and export coal, which would be found not to be in the same market.

1.1.4 "Price control"

The proposed definition of "Price control" is not consistent with price regulation as contained in the ports or the energy sector and these terms seems to be used interchangeably in the Bill. Price regulation in its purest form deals with the manner in which prices may be determined which assumes to be in accordance with a fair and transparent methodology based on the principle of ensuring the sustainability of the regulated entity. The particular objection in terms of this definition is with regard to the setting of the revenue that can be earned, the setting of revenue goes beyond the ambit of regulation and will automatically be regulated through the setting of prices.

1.1.5 "Transport sector"

In order to ensure fairness in the regulation of transport sectors, more importantly within the land freight industry, Transnet recommends that there should be no distinction between rail and road since operators within the sectors are providing transport services and competes amongst each other for market share (though road has competitive edge). Therefore, for purpose of economic regulation and competition policy, Transnet recommends that when dealing with a relevant market, that market should be defined within the land transport sector, in respect of the set of products and geographical areas that exercise competitive constraint on each other. It is recommended that the above phrase be reviewed and consideration may be given for the definition to read as follows:

"transport sector," means shipping and ports, aviation, land transport which include rail and road transport".

2.1 Interpretation

2.1.1 It is common cause that regulated entities are also subjected to the provisions of the Competition Act, 1998. Transnet has over the past years noted that regulated entities are being subjected to investigations by the Competition Commission for amongst others excessive pricing, exclusionary acts, price discrimination, etc. In instances where the Regulator will determine price control for services provided by regulated entities, such entities must be exempted from any investigation where the Regulator has made a determination on the matter. In this regard, it is further recommended that consequential amendments should be made to the Competition Act. Consideration should be given to include sub-clause (5), which may read as follows:

"(5) where the Regulator has made a determination on the matter, regulated entities will not be subjected to investigations by the Competition Commission in terms of the Competition Act, 1998"

2.1.2 The Bill seeks to regulate issues falling within the domain of other Regulatory Authorities. For example, amongst the purpose of the Bill is to promote safety. This matter is already regulated by the Railway Safety Regulator in terms of the National Railway Safety Regulator Act, 2000. In another example, the Bill provides that the Regulator will conduct market inquiries in terms of clause 43(2)(b) of the Bill. The Competition Commission is empowered (in terms of Chapter 4A of the Competition Act) to conduct market inquiries on any matter in relation to the general state of competition, the levels of concentration in and structure of a market for particular goods or services. In addition, the National Ports Act 12 of 2005 allows the National Ports Authority to regulate and control the provision of adequate, affordable and efficient port services and facilities and promote efficiency, reliability and economy on the part of the licensed operators in accordance with recognized international standards and public demand. It is common cause that there will be conflict between the envisaged Act and the aforementioned legislation in terms of these established Regulators. The current Bill seeks to either duplicate or usurp the functions of these Regulators resulting in over-regulation of the various sectors. Therefore, Transnet recommends that the following provisions should be added:

"(5) If there is an inconsistency between any provision of this Act and a provision of the Competition Act, 1998, the provisions of the Competition Act, 1998 shall prevail.

(6) If there is an inconsistency between any provision of this Act and a provision of the National Railway Safety Regulator Act, 2002, the provisions of the National Railway Safety Regulator Act, 2002 shall prevail."

(7) If there is an inconsistency between any provision of this Act and a provision of the National Ports Act 12 of 2005, the provisions of the National Ports Act shall prevail."

3 Objective of the ERT Bill

3.1 Single framework of economic regulation of Transport

3.1.1.1 The ERT Bill aims 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. Transnet's concern is that the ERT Bill fundamentally shifts from this objective when it focuses on other various substantive matters of policy development, competition regulation and oversight on safety regulation. The shift in focus exposes the transport industry to over regulation, resulting from different methodologies applied by multiple regulators.

3.2 Green and White Paper

3.2.1.1 At times, the process of making a law begins with a discussion document, called a "*Green Paper*". This is drafted by the Ministry or government department ("department") dealing with the particular issue in order to provide context and signal their intent or objective regarding a particular policy (for example, the Department of Transport). It is then published so that anyone who is interested can provide comments, suggestions and ideas.

3.2.1.2 A Green Paper is sometimes followed by a more refined discussion document, called a "*White Paper*", which is a broad statement of government policy. This is drafted by the relevant department or a task team designated by the Minister of that

department (for example, DoT). Comment may again be invited from interested parties. The relevant parliamentary committees may propose amendments or other proposals and then return the policy paper to the Ministry or department for further discussion and final decisions.

3.2.1.3 In our view, it would have been preferable for the DoT to await the Draft White Paper on National Rail Policy to be finalised prior to the introduction of the Economic Regulation Bill into Parliament. The current Draft White Paper on National Rail Policy is still in consultative stages and refers to Economic Regulation. However, it is worth noting that the economic regulation that is envisioned in the Draft White Paper on National Rail Policy only targets Transnet Freight Rail ("TFR"), a division of Transnet SOC Ltd as it is seen to be a freight rail monopoly. It should also be noted that TFR competes with commercial road freight operators for land freight transport market share. Currently commercial road freight operators still have in excess of 75% of the total land freight transport market share and directly compete with freight rail, particularly on general freight corridors.

3.2.1.4 It is further important to note that there is currently no Green or White Paper specifically targeted to all transport sectors to be regulated by the envisaged Act. It would have been preferable to have had in existence a Green or White Paper for Economic Regulation of Transport Sectors (i.e. rail, road, civil aviation and ports). Such a Green or White Paper would have assisted stakeholders/regulated entities to understand the conceptual thinking behind the proposed law reform. Stakeholder consensus and "buy-in" is critical to ensure broad acceptance of law-reform initiatives. The DoT has also initiated a process of a Review of the White Paper on National Transport Policy, 1996. Provision could have been made in this Review process with industry stakeholders and role players to develop a Policy Framework for Economic Regulation of the transport sector as a whole, rather than developing and tabling a Bill prior to the finalisation of the Review process.

3.3 Preamble

3.3.1.1 Transnet has noted that the Bill does not include "*the preamble*" (which should be the case as found in many regulatory requirements). The preamble usually contains a programme of action or a declaration of intent with regard to the broad principles contained in the particular legislation. Preambles tend to be programmatic and couched in general terms, but may be used during interpretation of legislation since the text, as a whole should be read in a particular context. Preambles provide the interpreter with a starting point – it is the key that unlocks the first door in the process of statutory interpretation. In *National Director of Public Prosecutions v Seevnarayan*, Griesel J rejected the argument that a preamble may be considered only if the text of the legislation is not clear and ambiguous as an outdated approach to interpretation. It is important that the preamble states the circumstance of, the background to and the reasons for the legislation.

3.3.1.2 The purpose of the envisaged Act is to regulate the transport sector. Yet the actual regulatory regime and framework is only applicable to sub-sectors of the total system. The Bill should openly apply to all sub-sectors of the transport sector from onset, more especially the commercial road freight operators. It is clear on the reading of the Bill that no private companies/operators/infrastructure owners are affected and impacted by the Bill in any real and meaningful way. Any provisions for some potential future economic regulation that may be imposed on the private sector has no real force and is likely to increase the advantage that the private sector currently holds in the transport system, particularly road freight transport operators and private port terminal operators.

3.3.1.3 Clause 3(1)(f) provides for the purposes of the envisaged Act, one of which is to *"promote appropriate investment in transport facilities and service".*

3.3.1.3.1 It is common cause that SOCs invest billions of rands in the railway and port infrastructure and commercial road freight operators partially contribute to the maintenance of the roads through payment of taxes and toll fees. The exclusion of the Private Sector (road freight operators) from the definition of a regulated entity could exacerbate this situation with the burden of the enhancement and development of that infrastructure falling squarely on the

shoulders of SOCs yet the private sector benefits from same. Transnet is required to fund the regulatory structures and to provide access to infrastructure that it has spent billions of rands on developing, maintaining and providing security of infrastructure assets.

4 Application of Act

4.1 Although the intention of the drafters of the Bill appears to throw the net as wide as possible and to cover all modes of transport and role players in the transport value chain, the wording of this clause may have an unintended limiting effect, and should be reviewed. For example:

4.1.1 The Legal Succession to the South African Transport Services Act, 1989 does not provide for economic regulation, which means that the railway industry would be excluded from the ambit of sub-clause (1).

4.1.2 The provisions of sub-clause (2) is in conflict with the definition of "*economic regulation*", which limits the ambit of regulation to "*facilities*" and "*services*".

4.2 Clause 4 (4) provides that when making a determination as envisaged in this clause, the Regulator must have found amongst others, that a least one firm operating in the market has market power. The introductory wording of this sub-clause presupposes that the Regulator will be making a determination on the application of the envisaged Act, whilst it is the Minister who will be making such a determination. Transnet recommends that this sub-clause should be reconsidered and consideration may be given for the sub-clause to read as follows:

"(4) When the Minister consults with the Regulator in terms of subsection (2), the Regulator must have found that –..."

4.3 It appears on the reading of the above provisions that the Competition Commission and the Regulator will have the authority to conduct a market inquiry. As already stated in clause 2.1 above, Transnet recommends that the matter relating to conducting market inquiry should be left to the Competition Commission. This will ensure that

there will be no duplication of roles and responsibilities and further reduce regulatory costs.

4.4 Clauses 4 provides that the Minister may grant exemptions to any specific market, entity, facility, or services from the application of the envisaged Act. Transnet recommends that the above sub-clause should be moved to part C, Chapter 4. An exemption provision should be added after clause 54. This is in accordance with the acceptable standards of legislative drafting. Exemption provisions are not included in the provision that deals with the application of the Act.

4.5 Clause 4(10) provides that the Minister may make Regulations relating to matters falling within the ambit of clause 4. Transnet recommends that this provision be moved to clause 54, which is a provision, which empowers the Minister to make Regulations in any matter prescribed in terms of the envisaged Act.

CHAPTER 2

5 Access to Rail Infrastructure

5.1 Determination of access costs and review of access agreements

5.1.1 The above phrase in clause 5 refers to "*rail infrastructure*" and "*infrastructure owner*" and such phrases are not defined in clause 1 of the Bill. In this regard it must be borne in mind that rail infrastructure is not only limited to the rail track and overhead track equipment, but that it also includes telemetry elements. By including the latter in the concept of rail infrastructure, the Regulator would have extensive powers to impact the tele-communication industry that is regulated by the Electronic Communications Act, 2005 under the auspices of the Independent Communications Authority of South Africa. In order to address these concerns, Transnet recommends that the phrase "*rail infrastructure*" be defined along the following lines:
"rail infrastructure" means the infrastructure used to move rolling stock."

5.1.2 Clause 5 refers to the phrase "*existing agreements*". For example, sub-clause (4) provides that "An infrastructure owner must lodge all existing agreements with

the Regulator... ". Transnet recommends that a definition is required to identify what existing agreements are being targeted. This has far reaching implications for transport agreements if such agreements are included, since one transport agreement may have the effect of preventing or limiting access to other potential customers.

5.1.3 This does not align with the definition in s56 of the National Ports Act, which results in a Terminal Operator Agreement that dictates access to terminals/infrastructure and includes service levels and conditions in accordance with section 68 of the Ports Act, 2005. Port planning or the orderly development of the current port system may have not been considered to the extent required nor the net impact thereof. This creates unintended problems. The Bill as it is does not contemplate the costs of disruption of a long term commercial transaction and what the access will have on such commercial transaction including the breakage costs that may occur nor does it contemplate and factor unsolicited bids which is not permissible under the current Act or the PFMA scheduled entities and how it will be dealt with in to satisfy s217 of the Constitution.

5.1.4 This matter is raised for attention as the current Commercial Ports Policy and the National Ports Act and enabling legislation was implemented to address past imbalance for example disruptions of port development, disruption to port performance by curbing landing and shipping rights outside a section 65, 56 and 57 or 79. Due to concurrent jurisdiction with NERSA which NERSA provision permit interconnection and does not align with the provisions of National Ports Act, of which the results thereof has been very few successful interconnections and it has resulted in a number of litigation cases.

5.1.5 Clause 5(4) provides that "*Within one year after the Minister has made a determination*" that the envisaged Act will apply to the rail infrastructure owner, such person must review all existing agreements that contain provisions that are not aligned to the provisions of the envisaged Act.

5.1.6 It should be borne in mind that the commercial arrangements that establish a right of access or the use of slots on the network include mainly transport agreements and lease agreements in respect of Transnet sidings. In addition to these commercial agreements there are a few examples of proper commercial access

agreements with regular train operators such as PRASA and Rovos Rail. However, once such commercial agreements are in place the regulatory requirements for railway safety also require a railway safety interface management agreement to regulate safe railway operations. The basic requirements of these railway safety interface management agreements are to be found in relevant National Standards and the SMS Determinations issued by the National Railway Safety Regulator in 2018. The National Railway Safety Regulator is also in the process of finalising a Framework for Interface Management Agreements that would be prescriptive as to what should be contained in such agreements. In order to avoid confusion and enhance cohesion, such railway safety interface management agreements should not be included in the scope of the ERT Bill.

5.1.7 However, the review of railway safety interface management agreements in the past provides a good case study for illustrating that the one year review period provided for in clause 5(2) of the Bill is unreasonable: TFR, a division of Transnet SOC Ltd, currently have in place 864 existing railway safety interface management agreements. During 2008, TFR went through a process of reviewing all Safety Interface Management Agreements in order to ensure compliance with the requirements of the National Railway Safety Regulator Act, 2002 and SANS 3000-1. Transnet managed the review of the Safety Interface Management Agreements as a project and a team of both internal and external legal advisors was appointed to assist the team and completed the review process in 3 years. Therefore, given the increase in the total number of existing agreements to be reviewed and lessons learnt from the review of the Safety Interface Management Agreements, Transnet recommends that the timeline for the review of all existing agreements to ensure compliance with the provisions of the envisaged Act be 3 years. Consideration may be given for the wording of the above sub-clause to read as follows:
"(2) within three years from the date of the determination contemplated in subsection (1), an infrastructure owner must review all existing agreements that contain provisions that are inconsistent with this Act."

5.1.8 Where the ERT Bill empowers the regulator to determine the cost of access to infrastructure and facilities, it is worth noting that for Transnet National Ports Authority (NPA), the cost of the rail infrastructure provided by the Authority is included in the Ports infrastructure and already regulated by the Ports Regulator.

Section 7 is unclear as to whether NPA's current "*wayleave*" is aligned to the provisions of an access agreement in this section. This raises a challenge of how NPA rail infrastructure is regulated and who has the regulatory authority over access arrangements with access seekers in the ports (rail infrastructure within port boundaries).

5.1.9 Clarity is sought on how this will be calculated by the regulator and secondly if this will be a published tariff for access. Clarity is sought if this access will now revert to a similar process as dictated by the Pipelines Act, where there is a clean process and description of how interconnectivity for pipelines must happen – must NPA then introduce a similar process for all "new" rail access to ports in future, trust that this does not impede NPA's ability to provide rail infrastructure as basic port infrastructure, in the absence of demand and a tariff being set.

5.2 Types of access requests and access fees

5.2.1 Clause 6 provides for the following types of access requests that may be regulated:

> "(a*) use of infrastructure that has been determined in terms of section 4, to run trains;*
> *(b) requests to physically interconnect infrastructure with infrastructure that has been determined in terms of section 4; or*
> *(c) requests to make investments in order to increase the capacity of infrastructure that has been determined in terms of section 4, where the owner of the said infrastructure has declined to make the requested investment to the requested specifications."*

5.2.2 It is worth noting that the determination as envisaged in clause 4 of the Bill appears to be limited to facilities and not infrastructure. It appears on the reading of clause 4(2) that the Minister's determination on the application of the envisaged Act would only apply to "*any market, or any entity or facility*" and not infrastructure. Therefore, reference to infrastructure in clause 4 should be reconsidered.

5.2.3 It is further important to note that, paragraphs (b) and (c) of clause 6(1) have far reaching implications for the autonomy of a railway operator/company in managing its business. Whilst the regulation of existing economic activity clearly falls within the concept of economic regulation, the expansion of economic activities as provided for in these paragraphs goes beyond such regulation – especially in a capital-intensive industry such as the rail industry. In this regard, it must be borne in mind that the expansion of rail capacity is usually linked to long-term transport commitments. In this regard, the powers of the Regulator to potentially force an expansion of capacity on a railway operator that would have no comfort that it would be able to recover its capital investment, may impact the long term financial sustainability and viability of an operator. It should also be noted that the power to enforce the "*expansion of capacity*" is not completely tempered by the requirements of clauses 8(4) and 9(2), since the impact on the rest of a network where capacity is expanded in one place is not accounted/provided for.

5.3 Contents of access agreements and notification to Regulator

5.3.1 Clause 7 prescribes minimum information that must be included in the access agreement, amongst that is the duration of the agreement. To avoid potentially having evergreen access agreements, it is recommended that the envisaged Act provide some guidelines on the duration of such agreements.

5.3.2 Clause 7(2) provides that before an infrastructure owner concludes an access agreement with the access seeker, such agreement be submitted to the Regulator. It is unclear as to whether the Regulator is required to approve or not approve the terms and conditions of such agreement before the parties conclude such agreement. It is further unclear as to how long it will take the Regulator to process such agreements. This may be another form of red tape that will make it difficult for access seekers to conduct business. Transnet recommends that the submission of this agreement to the Regulator should be for noting purposes only and where there are terms and conditions that require amendments, such amendments be made through an Addendum. Therefore, it is proposed that the infrastructure owner and access seeker should be allowed to conclude the agreement even

before the Regulator processes such agreement. Consideration may be given of rewording the clause 7(2):

"(2) the infrastructure owner must submit, in the prescribed manner and form, a notification to the Regulator of the access agreement and confirm that the terms and conditions are consistent with the provisions of this Act".

5.4 Request for and consideration of access approval by Regulator

5.4.1 Clause 8(4)(b) provides that in determining whether to grant access, the Regulator must have regard to amongst others, "*whether the access applicant is able to meet financial and other technical requirements...*"

5.4.2 The phrase "*access applicant*" is not defined in the Bill and the only phrase, which is defined, is "*access seeker*". Transnet recommends that the phrase "*access applicant*" be replaced by "*access seeker*".

5.4.3 This seems to introduce more complexity as the parties need to discuss and maybe implying that once discussions have taken place, the parties will approach the regulator for a decision. Transnet notices that the aspects of public tender or section 217 of the Constitution are not factored into the provision. Essentially the Regulator steps into the role of a regulated entity or operator and gets involved in the operations and capacity allocation. It is also the regulatory body hearing complaints and appeals, performing compliance, and determining tariffs. This again is an example of the Regulator wearing many hats and has exceptional executive power. Transnet recommends that the role of the Regulator should be to set the rules and then ratify the access agreements that have been concluded in line with the regulatory rules.

5.5 Decision on access approval

5.5.1 Cession, transfer or assignment of access rights

5.5.1.1 Clause 10 provides that An entity that has been granted access approval by the Regulator may cede or transfer any or all of its rights to a third party,

on condition that all its obligations remain fulfilled. It is worth noting that the infrastructure owner may also grant access to the infrastructure to the access seeker. Therefore, it appears on the reading of the Clause that cession, transfer and assignment of access rights will be permitted only to those access users that had already been approved by the Regulator in terms of clause 9(1) or (2). Transnet recommends that the scope of clause 10 should be extended to access agreements concluded between the infrastructure owner and access seeker without intervention of the Regulator. Transnet further proposes that the wording of clause 10 be reviewed and consideration may be given for the clause to read as follows:

"10. An entity that has been granted access approval in terms of section 9(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, ***and on condition that it has obtained the written approval of the infrastructure owner, which approval shall not be unreasonably withheld."***

CHAPTER 3

6 Economic Regulation of Transport Facilities and Services

6.1 The heading of the chapter presupposes that it will only apply to facilities and services offered by regulated entities. However, clause 11(1) states that "*Every regulated entity that is subject to price regulation will be subject to price control determined by the Regulator*". It is unclear whether it is the intention of the drafters to exclude infrastructure from the ambit of the Bill. Transnet recommends that the heading of this Chapter should be reconsidered. Consideration may be given for the heading to read as follows:

"*Economic Regulation of Transport Facilities, Services and Access to Infrastructure*"

Part A

7 Price Regulation

7.1 Determination of price controls

7.1.1 Transnet has noted that regulated entities will be subject to price regulation in accordance with a price control determined by the Regulator. The price control for a regulated entity will comprise of fees for any transport service. As stated earlier, Transnet is a provider of access to rail infrastructure. The provision of transport services is highly competitive in the sense that rail compete with commercial road freight operators and therefore it should not be regulated and rather be left to the regulation of the competition authorities.

7.1.2 The clause as it currently reads is unreasonably broad and allows the Regulator unfettered power to determine price control without consultation with key stakeholders or the regulated entity. Therefore some form of consultative process needs to be built into to the price control determination to ensure the Regulator acts fairly, transparently and with the aim of ensuring the sustainability of the regulated entity's business. Section 11(1) should read as follows:

> "Every *regulated entity is subject to price regulation in accordance with a price control methodology determined by the Regulator in consultation with each regulated entity"*

7.1.3 The above clause provides that each regulated entity must submit a proposal to the Regulator, requesting approval of price control for the facilities and services offered by that regulated entity. The Bill does not provide for the timelines within which the Regulator will make a decision on the proposed price control. Transnet recommends that the envisaged Act should prescribe timelines within which such proposal must be made and the time frame within which the Regulator must notify the regulated entity concerned of its decision.

7.1.4 Reference is made to the limiting of the revenues that may be generated. However, no consideration is provided for the costs that should be considered

when limiting such revenue. In this regard, precedence/guidance should be obtained from the Port Directives (approved on 13 July 2009 and gazetted on 06 August 2009); Electricity Regulation Act, 2006 (Act No.4 of 2006)[Section 16]; and the Petroleum Pipelines Act, 2003 (Act No. 60 of 2003)[Section 28]. Proposed wording to be included.

7.1.5 In considering the revenues, the Regulator will give due consideration to whether it is desirable that the tariffs which are approved, enable the regulated entity to:

"(a) Recover its investment in services and facilities'
(b) Recover its costs in maintaining, operating, managing, controlling and administering infrastructure to provide services and facilities; and
(c) Make a profit commensurate with the risk of owning, managing, Controlling and administering infrastructure to provide services and facilities."

7.1.6 The aforementioned points must be given expression in the Bill.

7.1.7 In terms of section 11(4) Transnet submits that this level of regulation goes beyond the purpose sought to be achieved in terms of the Bill. Given the level of granularity proposed it is questionable whether the Regulator will have the capacity to sufficiently consider all of these areas not to mention the time it will take to do so for each regulated entity. The effect will lead to inefficiency in the sector not to mention rendering the purpose of price control ineffective. It will drive the cost of regulation up exponentially which cost will ultimately be passed on to the customer. No regulated entity will be able to sustain this level of regulation.

7.1.8 In term of section 11(9) when determining a price control, the Regulator may impose conditions that provide for an annual adjustment to reflect changes in the relevant price index. In the event that such a conditions is imposed the concern is that the regulated entity has no recourse for this to be reviewed in the event that such an adjustment has unintended negative consequences on the revenue of the regulated entity. A form of recourse for regulated entities should be provided for in the Bill.

7.1.9 Regarding subsection (10) and (11) dealing with the implementation of price deviations by regulated entities. Prior to the implementation of price deviations the regulated entity is required to submit the impact thereof on the entity's revenue, costs and profitability. It is submitted that price deviations are negotiated based on objective and substantive criteria to ensure long term profitability. The requirement together with the time period indicated will severely impede the ability of regulated entities to perform their business activities. It is results in the over-reach previously mentioned herein of the Regulator. The time period allowable in terms of the Bill is unreasonably long and does not take into consideration the pace at which the industry moves. It is noted that subsection 12 of the previous iteration of the Bill has been removed allowing for that in the event the Regulator did not approve the deviation within a period of 15 (fifteen) days of receipt the deviation was deemed to have been approved. This makes compliance with this section more tolerable.

7.1.10 Finally in terms of section 12 regarding the extraordinary review of price controls the section provides that at any time after a price control takes effect, the Regulator of its own accord or on application by the regulated entity or on application by the Minister or another person directly affected by the price control, may conduct an extraordinary review of the current price control. It is submitted that in the event such extraordinary review is conducted at the Regulator's own instance or at the instance of the Minister or other affected person, no opportunity is given to the regulated entity to make submissions in relation to such review or be consulted. This should be given expression to in the Bill in terms of this section.

8 Economic Oversight of Regulated Entities

8.1 Information from regulated entities

8.1.1 The ERT Bill requires from the regulated entities, submission of development plans for the facilities it operates, or has licensed others to operate, or the services that it provides or has licensed others to provide. Whilst the National Ports Authority is in support of furnishing the Regulator with its National Ports Plan containing the

Port Development Framework Plans, The ERT Bill is silent on the cause of action when the Regulator disagrees with the contents of development plans.

8.1.2 Moreover the extent of information that must be provided or that may be requested by the Regulator has no reference to the fulfilling of its actual mandate which is to ensure economic regulation. The extent of the information creates an undue administrative burden resulting in the escalation of the costs of regulation

8.2 Regulatory accounting and disclosure requirements

8.2.1 Clause 14 provide that the Regulator may require of a regulated entity to have an independent review of the financials and other relevant information by the regulated entity's auditor, or by an alternative auditor nominated by the Regulator in consultation with the regulated entity.

8.2.2 It is worth noting that the regulated entities will mainly be organs of state as defined in section 239 of the Constitution. When an organ of state contracts for goods and/or services, an organ of state is constitutionally required to follow a procurement system that is *"fair, equitable, transparent, competitive and cost-effective"*. It is common cause that an auditor who will be nominated by the Regulator will not be appointed in accordance with the aforementioned procurement clause. Section 2 of the Constitution states that the law or conduct which is inconsistent with it, is invalid. Therefore, an appointment of an auditor will have to comply with the procurement clause or Transnet recommends that the Regulator shall not nominate an auditor to audit the regulated entity as this may be seen as contravening the procurement clause. The resultant expenditure may then be classified as irregular expenditure in terms of the Public Finance Management Act, 1999.

8.3 Complaints against regulated entities

8.3.1 Section 15 of the Bill overrides section 46 and 47 of the National Ports Act. It is odd that the Bill does not also repeal sections 46 and section 47 of the National Ports Act. It is not understood how still in terms of section, 47 of the National Ports Act a ground for complaint against the Authority can be that Transnet is

treated more favourably and that it derives an unfair advantage over other transport companies; whilst in future circumstances may occur where the applicable agreement is approved by the Transport Regulator. (Section 1(6) of Schedule 1 of the Bill amends section 56 of the National Ports Act).

8.3.2 In addition complaints regarding the issuing of licences should not be adjudicated by the Regulator as this usurps the mandate and power of existing Regulator to adjudicate on this issue.

8.3.3 In terms of the initiation of investigations of complaints, it is our contention that in the event the Regulator initiates an investigation it can in no way be involved in such investigation. It should therefore not be permitted to designate persons to assist in the conducting of an investigation or determine the procedure for such investigation. This would allow the Regulator to unduly influence an investigation that is meant to be independent and objective in nature in order to suit a particular outcome. Section 16(2), (3) and (4) in essence allows the Regulator to be a player and referee. The Regulator in effect would be allowed to determine the procedure for an investigation into a complaint and then have the right to adjudicate that very same complaint.

8.1 Directed price control reduction

8.1.1 Clause 21 provides that the Regulator may direct a reduction in the current applicable price control for any facilities or services provided by a regulated entity. It is worth noting that the Regulator's power to direct a reduction in price control may negatively affect loan covenants that a regulated entity is subjected to.

8.1.2 Clause 21(3) provides that the Regulator may direct a reduction in the current applicable price control for any facilities or services provided by a regulated entity. It is worth noting that the Regulator's power to direct a reduction in price control may negatively affect loan covenants that a regulated entity is subjected to.

8.1.3 Clarity is sought as to whether the penalty is applied to NPA's turnover, Transnet's turnover or the combined regulated businesses in Transnet being, NPA, TFR and Transnet Pipelines.

CHAPTER 4
ESTABLISHMENT OF INSTITUTIONS

Part A

9. Transport Economic Regulator

9.1 Establishment of Transport Economic Regulator

9.1.1 Clause 29(2)(a) provides that the Regulator will have jurisdiction throughout the Republic. It is worth noting that some of the regulated entities conclude transport services agreement with an over-border customer (as Transnet currently does). However, it is unclear as to whether the Regulator will have jurisdiction to determine price control where the regulated entities transact with over-border customers. Transnet recommends that the scope of the Regulator should be limited to customers and business operations that takes place within the Republic.

9.2 Functions of Regulator

9.2.1 The above sub-clause provides that the Regulator will be responsible for amongst others to conduct market inquiries in accordance with clause 43(2)(b). It is worth noting that the Competition Commission is the only regulatory body which is empowered to conduct market inquiries in terms of section 21(1)(a) of the Competition Act, 1998. Therefore, Transnet recommends that this provision should be reconsidered given that it results in the duplication amongst regulators and consideration should be given of deleting this clause. This comment also applies to clause 43(2).

9.2.2 In terms of governance and oversight of the Regulator it is noted that the Board is regarded as the accounting authority of the Regulator but section 29(3) does not reconcile with section 30(10)(a). The Public Finance Management Act out ranks this Bill and the Board should oversee the decisions made by the Executive. Section 30(10)(a) in our submission should be deleted as it is contrary to good governance regulation.

9.3 Minister may call for inquiries or investigations

9.3.1 Clarity of roles is required in terms of defining the differences in the inquiries and investigations initiated by the Minister as compared to those that are initiated by Regulator. Transnet recommends that consideration be given to Minister channeling requirements via the Regulator so as to streamline and prevent any potential conflicts.

10. Finances

10.1 Cost of Regulation

10.1.1 The NDP provides for the reduction of the cost of transport and logistics in the country. The SEIAS requires that the cost of regulation be considered when new legislation is proposed. It is worth noting that the President during the 2020 SONA address emphasised that the cost of doing business in the country must be reduced. Furthermore, the Transnet Shareholder Compact 2020 indicates: *"(6.2) Transnet's key role is to assist in lowering the cost of doing business in South Africa, enabling economic growth and security of supply through providing appropriate ports, rail and pipeline infrastructure as well as operations in a cost effective and efficient manner within acceptable benchmark standards. (6.3) The Board shall ensure that Transnet and its subsidiaries comply with the provisions of the Companies Act, the PFMA, the King Code on Corporate Governance and any other legislation, including applicable regulations and guidelines issued by the National Treasury and or the Shareholder Representative."*

10.1.2 The scope and application of the Bill is determined by the entities being declared as regulated entities in terms of clause 4(2) of the Bill. Transnet has noted that the regulated entities will bear the costs of the Regulator and the Council in terms of clause 51(1)(a). The unavoidable implication of this approach is that if only few entities are for the time being declared as regulated entities, those entities would have to carry the whole of the set-up and operating costs of the Regulator as provided for in clause 51 of the Bill.

10.1.1 Furthermore, Transnet is regulated by the National Railway Safety Regulator ("RSR") which is established in terms of the National Railway Safety Act, 2002 and is required to pay annual fees to maintain its safety permit. In so far as the RSR's operating costs may be used as a comparable yardstick as to what the Regulator and the Council would require to fulfil their respective mandates, an amount of R150 million per annum would appear to represent a fair evaluation. In so far as Transnet would be the major contributor of the annual fees, the said amount of R150 million together with the R110.01 million (amount paid by Transnet for its safety permit for 2020-2021 FY) that must be paid to the RSR would result in Transnet having to pay more than R260 million per annum just to operate the railways and to maintain the rail infrastructure. Apart from the fact that these costs of regulation go against the policy of government to reduce the cost of doing business in South Africa, the financial viability of Transnet may be compromised if the Regulator does not account adequately for these costs in the approved tariffs The principle that regulated entities will fund the costs of the Regulator and the Council goes against the President's 2020 SONA statement since the regulated entities may pass on these costs to its customers – unless the benefits of regulation can be shown to outweigh the costs of regulation as per SEAISA and RIA studies.

10.1.2 Minister to determine annual fees to be paid by regulated entities

10.1.3 The above clauses provide that the regulated entities will pay annual fees to the Regulator and such annual fees will be used to fund the operations of the Regulator and the Council.

10.1.4 It is common cause that the cost of regulatory compliance in South Africa negatively impacts on the economic growth of the country. Any provision to fund the economic regulators is recoverable through tariffs and prices charged by the regulated entities, end up being treated as pass- through costs to be absorbed by the customers. Due consideration should be given to affordability and assist the lowering of the cost of doing business in South Africa.

10.1.5 It is noted that the envisaged Act will impose a huge financial burden on the regulated entities and this will further make it more difficult for regulated

entities to reduce costs of doing business. In the case of rail, any pass-through elements adding onto high cost will cause freight customers to choose a cheaper mode of transport, which becomes road. Transnet recommends that the funding model of the Regulator be detailed in the ERT Bill so that it can be agreed-on.

10.1.6 It is noted that the envisaged Act will impose a huge financial burden on the regulated entities and this will further make it more difficult for regulated entities to reduce costs of doing business. In the case of rail and the ports sector, any pass-through elements adding onto high cost will cause freight customers to choose a cheaper mode of transport, which becomes road. Transnet recommends that the funding model of the Regulator be detailed in the ERT Bill so that it can be agreed-on.

10.2 Unconstitutionality of clause 50(1) read with clause 51(1)

10.2.1 Clause 51(1) provides that the regulated entities will bear the cost of the Regulator and the Council. Section 73(2)(a) and 77 of the Constitution of the Republic of South Africa, 1996 ("the Constitution") sets out the requirements of a "Money Bill". A qualifying feature of a Money Bill is that it imposes taxes, levies, duties or surcharges. The fact that the annual fee to be paid by regulated entities will be used to fund the operational expenses of the Regulator and the Council, means that it is a tax that ought to be imposed by way of a Money Bill as provided for in section 77 of the Constitution.

10.2.2 In the case of ***South African Reserve Bank and another v Shuttleworth*** and another, the question before the Constitutional Court was whether the levy imposed in terms of the Currency Exchange Control Regulations ("the Regulations") constituted a tax that had to be collected through a Money Bill. Shuttleworth argued that the levy imposed by the South African Reserve Bank ("SARB") constituted a tax and the Regulations thereof should be declared invalid since the Regulations were not enacted in accordance with the prescribed constitutional provision. Moseneke DCJ (as he then was) stated:

"Our first chore must be to assign meaning to the undefined words in section 77 of the Constitution: "national taxes, levies, duties [and] surcharges". Their

scope is plainly limited to charges at the national level. Nevertheless, the use of all four terms must betray a design to cover a wide field of charges. However, a trawling of our national legislative instruments using the terms tax, levy, duty, or surcharge, suggests that the terms are of wide import and are often used synonymously and interchangeably...

10.2.3 This *means that a literal meaning of any of the terms is less than useful. The mere label of a charge as a tax or levy or duty or surcharge tells us little about whether it is hit by the requirements of section 77(1)(b). We must resort to the context within which the term is used and the purpose for which the tax, levy, duty or surcharge has been imposed.*

...Section 77(1)(a) of the Constitution, which provides that a money Bill is any Bill that "appropriates money", cannot be understood to refer to any instance where revenue is incidentally raised. This would be an overbroad and unworkable meaning. "Appropriates money" must be understood to refer to the allocation of revenue raised as tax and not as a regulatory charge...how does one distinguish a regulatory charge from a tax that may be procured only through a money Bill?...courts have warned that the use of the words fees, tariffs, levies, duties, charges, or surcharges in a particular statute is not conclusive of whether the statute imposes a regulatory charge or a tax...

*10.2.4 Therefore, aside from mere labels, the seminal test is whether the primary or dominant purpose of a statute is to raise revenue or to regulate conduct. If regulation were the primary purpose of the revenue raised under the statute, it would be considered a fee or a charge rather than a tax. The opposite is also true. If the dominant purpose is to raise revenue then the charge would ordinarily be a tax. There are no bright lines between the two. Of course, all regulatory charges raise revenue. Similarly, "every tax is in some measure regulatory". **That explains the need to consider carefully the dominant purpose of a statute imposing a fee or a charge or a tax**. In support of this basic distinguishing device, judicial authorities have listed non-exhaustive factors that will tend to illustrate what the primary purpose is. Since the 1950s, in small trickle, our courts have pronounced on whether certain statutes authorised a tax or regulatory charge.*

10.2.5 ***In Maize Board v Epol (Pty) Ltd***, *the Court held a levy not to be a tax, in part because it was not imposed on the public as a whole or on a substantial part of it. The revenues were not utilised for public benefit as only a few would benefit and a large portion of the revenue was used to defray administrative costs...*

10.2.6 ***In the end it boils down to whether the dominant object of the*** *enactment* ***was to raise revenue to fund the State and its public operations or to regulate public conduct by charging a fee or levy...Not every law that permits the raising of national revenue is a money Bill. That is plain from the Constitution***. *It sets money Bills apart from other laws and imposes a distinct procedure for their passage. This is because there are indeed many other laws that themselves impose, or authorise the Executive to impose, a myriad of charges outside the strictures of money Bill requirements. In each case, as our and other courts have often held,* ***the primal question is: what is the dominant purpose of the revenue raising law concerned? To raise revenue in order to fund the operations of the State, or to regulate behaviour or defray costs or advance another legitimate purpose?"***

10.2.7 It is clear from the above dictum that when determining whether the "annual fee" (as envisaged in clause 50 read with clause 51) falls within the ambit of a Money Bill, the seminal test is what the dominant purpose of the annual fee to be levied is. Clause 50(1)(a) of the Bill states that "The Regulator and the Council are each financed from the annual fees to be paid by regulated entities, as determined by the Minister in terms of section 51". Clause 51(1)(a) states that each year the Regulator and the Council must prepare and submit to the Minister a joint proposal, requesting an annual fee to be paid in the following year by each regulated entity, 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."

10.2.8 It is common cause that the Regulator and the Council will use the annual fee to be paid by regulated entities to defray their administrative costs. In view of the above court decisions, Transnet holds the view that clause 50(1) read with clause 51(1) is unlawful and unconstitutional since such fee can only be levied through a Money Bill as contemplated in the Constitution.

10.2.9 Therefore, any provision of the Bill that is contrary to the Constitution will be invalid, hence Transnet strongly recommends that the Minister must review clause 50 read with clause 51 and introduce the latter provisions through a Money Bill procedure as contemplated in section 77 of the Constitution.

10.3 Regulations

10.3.1 Clause 54(1)(c) provides that the Minister may make Regulations "*regarding any matter that may be considered necessary or expedient to prescribe in order to achieve the objects of this Act*". This power is too widely framed and would be in contravention of the principles set out in the *Executive Council of Western Cape Legislature and Others v President of the Republic of South Africa and Others*, where the Constitutional Court held that the delegation of the power to make subordinate legislation is not an unbridled power and does not imply an absolute discretion to make such subordinate legislation.

Chapter 5

Part A

11. Powers in Support of Investigation

11.1 Chapter 5 in general, seeks to criminalise certain behaviour and confer upon the "inspectors" authority that is usually in line with regulatory entities that have, not only an enforcement leg, but a specific unit to prosecute complaints and offences. An example of such a body is the Competitions Commission.

11.2 In this instance the ERT Bill does not contemplate the establishment of its own prosecuting function but will be relying on the National Prosecuting Authority to take over the process as outlined in clause 18. Given the provisions inherent in clause 18, the powers, which are usually akin to a prosecuting body, should therefore be removed. This recommendation is aimed at aligning with the provisions entailed in clause 18, as a failure to rectify these excessive powers would lead to a question of "*given that the ERT Bill does mirror the competition act and its powers why then is the further regulatory authority established?*'

11.3 It is advisable that this be reviewed as there are constitutional cases offering sufficient jurisprudence on cautionary of such action.

11.4 Appointment of inspectors and investigators

11.4.1 The clauses relating to the powers in support of investigation are highly concerning and seems to give the Regulator unfettered powers to employees and a number of contractors or employees to use the criminal procedure powers to question / interview and investigate matters. The socio economic impact of this very large workforce and the cost of running this department is not available.

11.5 Subpoena

11.5.1 As the Regulator is underpinning its enforcement powers on the Criminal Procedure Act 51 (CPA), the issuing of subpoenas must likewise be issued as per the CPA, namely by a judicial officer (CPA, Section 179).

11.6 Authority to enter and search under warrant

11.6.1 This is a function that must be limited to the judiciary court judge and must be done on affidavit stating reasons for the search warrant.

11.7 Powers to enter and search

11.7.1 One needs to understand the application of criminal procedure powers in economic regulation. If persons are going to be searched on the same standard as criminal procedure then these provisions must be all aligned to the Criminal Procedure Act – once again – unfettered powers.

11.8 Claims that information is confidential

11.8.1 Transnet has noted that the Bill does not make provision for the management of legally privileged documents. It is recommended that the Bill make provision for such documents.

SCHEDULE 1

12. Consequential Amendments

12.1 Amendment of National Ports Act

12.1.1 NPA supports the amendment proposed contained in sections 1(1) of Schedule 1 of the Bill, which relates to the substitution in subsection 1 of the National Ports Act, with the definition of "*Regulator*" to mean "*the Transport Economic Regulator established by section 27 of the Economic Regulation of Transport Act, 2020*".

12.1.2 Consequential amendments - Section 46 and 47 of the National Ports Act should be repealed in its entirety. Further, it is not understood how the 46 and 47 can be amended. In addition, reference to section 30(3) of the National ports Act should be repealed as well.

12.1.3 All appeals and complaints should be dealt with in terms of the Transport Regulator Bill in section 15 and part C.

12.1.4 One cannot have two sets of legislation governing for complaints and appeals. The risk being that there could be inconsistencies between the two pieces of legislation and or appellants/complainants could embark upon process shopping with the

possibility of appellants/complainants having two bites at the cherry for the same underlying cause of action. Recommend also that definition of complaints be expanded to include basis for an appeal (premised on a decision of the Authority) and in so doing prevent disputes arising around which process route (complaint or appeal) should have been followed.

12.1.5 Section 1(3) and section 1(6) of Schedule 1 of the Bill states that the National Ports Act is amended by the repeal of sections 29 to 45 and 48 to 55, which is supported. It is unusual that the Bill does not also repeal sections 46 and section 47 of the National Ports Act. It is recommended that Section 46 and 47 of the National Ports Act 12 of 2005 be repealed in its entirety as all appeals and complaints are adequately dealt with in the Bill. Also recommended that complaints and appeals processes be collapsed into one process, with appeals against a decision of the Authority forming a basis of a complaint, so as to avoid any debate around which avenue (complaint or appeal process) should have been utilised.

12.1.6 As comparison examples, Section 1(6) of Schedule 1 of the Bill amends section 56 of the National Ports Act. In this regard, the Bill reflects that if the circumstances contemplated in subsection (6)(c) apply namely; if an agreement contemplated in subsection (1) or (4) includes, as a party, an entity that is a subsidiary or a division (for example, Transnet Port Terminals) of an entity under whose ownership, management or control the Authority falls, the agreement, amongst other things, must be approved by the Regulator, the fees payable to the Authority in terms of Section 73 (1)(c), accrue to the Regulator. (For ease of reference, section 73(1) (c) of the National Ports Act, refers to the Authority's fees relating to the granting of concessions and licences).

12.1.7 The question to be asked is what the fees that subject to regulatory determination are. Does rental fees constitute regulated income? Alternatively, is the determinations by the Regulators limited to those fees stipulated in the Tariff Book? If the Regulator is to approve lease and rental agreements then how does the ERT Bill contemplate on the Regulator dealing with appeals/complaints and then referring to the Council for hearing? Furthermore, this illustrates a clear case of the simultaneous role of referee and player by the Regulator. It should be noted

that economic regulation is the provision of oversight on the activities of the regulated entity and not management control.

12.1.8 In the light of the above, in respect of the appeal or complaints considered together with the other powers of the Regulator, it is recommended that the Regulator should not be involved in the agreements between the participants and the infrastructure owners other than in the capacity of setting rules and providing oversight.

12.1.9 On Subsection 1(7)(6A), It is unclear as to whether the Regulator will need to be consulted in each instance NPA intends going out to market as it would be at this stage that the Regulator will then have an influence on the RFP's and RFIs. Clarity is sought as to whether NPA is required to consult the Regulator when it intends to go out to market in respect of RFP's and RFIs. The roles of the regulated entity and the economic regulator needs to be clarified as this could impact negatively in terms of the developmental objective – timing, administration, decision making.

12.1.10 Subsection 1(7)(6B), (8) and (9) Schedule 1 (6) of the Bill amends section 56 of the National Ports Act. In this regard, section 1(6)(c)(8) of the Bill reflects that if the circumstances contemplated in subsection (7) apply, the fees payable to the Authority in terms of Section 73 (1)(c), accrue to the Regulator. (For ease of reference, section 73(1)(c) of the National Ports Act, refers to the Authority's fees relating to the granting of concessions and licences). The inclusion of this section will reduce the annual turnover of NPA and Transnet substantially as the revenue received will accrue to the Regulator. The Regulator cannot merely appropriate fees payable to another statutory entity to itself by means of an amendment to a primary piece of legislation through another Act.

12.1.11 On Subsection 1(7) and (8), it appears that the Regulator will need to authorise agreements concluded between parties and it has the right in terms of the referenced sections to make amendments thereto. This is contrary to the principles of contract law and will affect the viability of transactions, if negotiations between third parties have been concluded. In addition, not supported, as a natural consequence will be additional in-ordinate delays being

introduced to the finalisation of a process, which is already very lengthy in nature. Agreements that are in place prior to the commencement of the Act are to be left as is.

12.1.12 On Subsection 1(7) and (8), it appears that the Regulator will need to authorise agreements concluded between parties. This may affect the viability of transactions, if negotiations between third parties have been concluded. In addition, not supported, as a natural consequence will be additional in-ordinate delays being introduced to the finalisation of a process, which is already very lengthy in nature.

12.1.13 Section 1 (2) - The National Ports Act, 2005 (Act No. 12 of 2005) is hereby amended by the repeal of sections 29 to 45. With this repeal, how the Economic Regulator is held accountable in terms of its Decisions, Accounting, Accountability, and Annual Report.

12.1.14 On Schedule 1 Subsection 6(c), (7), (8) (9) Ports Act s11 (5) cross-referenced to s44 which will be repealed thereby creating a legislative gap.

12.1.15 Subsection 6(c), (7)(b) is unclear and vague.

12.1.16 The reference to subsection 5 (Subsection 5 results in the repeal of Section 48 to 55) may require correction, as it currently does not make sense.

12.1.17 Amendments to Section 72 of National Ports Act the bold text included in square brackets, appears to denote deletion. This would mean that only the "un-bold" text remains. This oversight needs to be addressed.

12.1.18 Confirmation is required that the bold text included in square brackets, does in fact denote deletion and that only the "un-bold" text remains.

12.1.19 On Schedule 2, Section 3(3) The Transport 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 three years immediately before the effective date. If the

provisions have been repealed then how can one rely on non-existent provisions to investigate matters retrospectively? It is recommended that the provisions of the Bill should only going forward (i.e. prospectively).

12.1.20 If a cause of complaint arose before the date of effectiveness of the Bill then provisions of the National Ports Act apply. i.e. no retrospective application.

12.1.21 Schedule 2 Clarity is required on how the Regulator will address the situation if a new financial year progresses without a tariff determination by the Economic Regulator. NPA proposes that in the transitional period, where an existing Regulated Tariff Methodology exists, same should be applied, alternatively, at a minimum, an inflationary tariff adjustment should be effected.

12.1.22 Whilst all regulated entities fall within the transport industry, each sector is considered complex with its own peculiar challenges. The ERT Bill is not explicit on the economic regulatory regimes that will be adopted for each mode of transport. Transnet recommends that the economic regulation regimes should be established as instruments of regulation that will apply before enactment of the law.

12.1.23 On Port Directives, the price control now falls within the jurisdiction of the Bill. Clarity is required on how the Bill will provide recognition of the detailed tariffing aspects provided for in the Port Directives aimed at aiding economic regulation.

12.1.24 The references to the National Ports Act is section 81 and 82 – the ERT Bill also set consultative committees for the transport sector and does not repeal 81 and 82. Nor does it fit the current provisions of 81 and 82 into the draft. No guidance is provided on the role of the National Port Consultative Committee (NPCC) as envisaged by the National Ports Act e.g. section 72(2). Guidance should be provided in this regard. Regulations, directives and Port rules will still be required to be amended to align with the ERT Bill on the National Ports Act.