

## NOTICE 391 OF 2008

**DISCUSSION PAPER****REGULATORY PRINCIPLES: THE PORTS  
REGULATOR OF SOUTH AFRICA**

*The Ports Regulator invites comments from all interested parties on this paper prepared by the Ports Regulator as part of a public consultation process.*

Responses to this Discussion Paper should be sent to Mr Ebie Fakie, Board Secretary, Ports Regulator:

- a) by post to: The Ports Regulator, Private Bag X 54322, Durban, 4000
- b) by fax to: 031 365 7858
- c) by email to: [ebief@portsregulator.org](mailto:ebief@portsregulator.org)
- d) by hand to: 11<sup>th</sup> Floor, The Marine, 22 Gardiner Street, Durban

The closing date for receipt of submissions is : 25 April 2008

## 1. CHAIRMAN'S INTRODUCTION

1.1 The Ports Regulator was established under the provisions of the National Ports Act, 2005. Under this Act, the main functions of the Ports Regulator are to:

- a) exercise economic regulation of the ports system in line with government's strategic objectives;
- b) promote equality of access to ports and to facilities and services provided in ports;
- c) monitor the activities of the Transnet National Ports Authority [TNPA] to ensure that it performs its functions in accordance with this Act.

1.2 The Members of the Ports Regulator were appointed with effect from 1 January 2007. Its first meeting was held on 28 March 2007.

The members of the Ports Regulator are:

- Mrs Gloria Tomatoe Serobe (Chairman)
- Ms Phumzile Langeni
- Ms Tandiwe Njobe
- Mr Andrew Pike
- Professor Doug Blackmur
- Mrs Ella Ntshabele
- Dr Brian Gowans
- Mr Randall Howard
- Mr Mawethu Vilana

1.3 The Ports Regulator recognises its obligation to discharge its regulatory responsibilities efficiently, equitably and in the best interests of the people of South Africa as a whole. It acknowledges that regulation can produce gainers and losers; and that it can affect property rights, economic growth and income distribution. It is well aware that regulation generates compliance and other costs which

must be measured against the benefits associated with regulatory activity.

- 1.4 In this context, the Ports Regulator is committed to consulting with its stakeholders, and the community at large, over what ought to be its regulatory principles. This Discussion Paper has been written to facilitate this debate and to stimulate ideas. It does not cover every conceivable issue, and it does not seek to confine the responses to any pre-determined avenues. Submissions on issues considered important by any stakeholder which are not addressed in this paper are most welcome. All responses to this Discussion Paper will be given serious consideration by the Ports Regulator.
- 1.5 This debate, and the Ports Regulator's ultimate determination of its principles, must take place in the context of the provisions of the National Ports Act, 2005; other relevant legislation; and the policy objectives determined by the government. The Ports Regulator must protect and advance the public interest as defined by government policy, the National Ports Act, 2005 and the Regulations.
- 1.6 Government policy with respect to South Africa's commercial ports is as follows:

***Vision:** South Africa's commercial ports system should be globally competitive, safe and secure, operating at internationally accepted levels of operational efficiency consistent with the goals and objectives of the Government's macroeconomic strategies. The commercial ports system must serve the economy and meet the needs of port users in a manner which is economically and environmentally sustainable. [White Paper on National Commercial Ports Policy, 2002, p.11]*

**Goals:**

- *To invest in port infrastructure, superstructure, equipment and system in ways which satisfy social, financial, economic or strategic investment criteria;*

- *To improve the safety, security, reliability, quality and speed of port operations and services;*
- *To enable port users to access the port system in the most efficient way possible;*
- *To promote good employment practices and standards;*
- *To achieve the above goals in a manner which is economically and environmentally sustainable, and minimises negative externality impacts on non-users; and*
- *To promote intermodalism.*

*[White Paper on National Commercial Ports Policy, 2002, pp.11-12]*

**Objectives:**

- *Ensure safe affordable, effective and efficient port services;*
- *Encourage fair competition based on transparent rules applied consistently across the transport and port system;*
- *Improve infrastructure and service levels where appropriate, based on user needs;*
- *Ensure safe transportation, a clean environment and service to designated areas;*
- *Establish appropriate institutional arrangements and legislation to support the governance of ports;*
- *Promote the development of an integrated regional production and distribution system of support of government industrial policies;*
- *Facilitate and enhance the expansion of international trade and tourism in general, and export in particular;*
- *Promote the development of an efficient and productive South African port industry capable of competing in international markets;*
- *Establish an appropriate regulatory framework that is also flexible and responsive;*
- *Ensure high quality training and development of human resources;*
- *Promote increased international relations;*
- *Ensure cost effective and efficient port management and operation;*

- *Ensure proactive integration of social, economic and biophysical environmental aspects during the early stages of port planning and throughout the port development cycle including the planning, design, construction, operation and decommissioning of port developments;*
- *Ensure proactive communication and consultation with port stakeholders early on in the port planning stages;*
- *Ensure that strategic port planning is closely aligned with the integrated development planning process of the associated city; and*
- *Promote Black Economic Empowerment and Small, Medium, and Micro Enterprises.*

*[White Paper on National Commercial Ports Policy, 2002, p.12]*

#### ***National Commercial Ports Policy, Basic Principles:***

- *National needs, aspirations and requirements shall be of primary consideration;*
- *Consideration of user and other stakeholder needs and views;*
- *Port system development, management and enhancement will primarily remain a national function;*
- *Regulation should be kept to a minimum without compromising national aspirations, safety, health, security, efficiency and environmental sustainability;*
- *Participants in the market should be treated equally and fairly;*
- *The principle of user pays or cost recovery, benchmarked against international best practice to ensure that the costs are globally competitive will be applied as far as possible, including an appropriate return; and*
- *Strategic port planning will include the integration of social and biophysical aspects at the earliest stages to ensure sustainable port development.*

*[White Paper on National Commercial Ports Policy, 2002, p.13]*

The Ports Regulator will advance these policies at the minimum cost to the South African community through the responsible and efficient exercise of its powers as defined in the National Ports Act, 2005.

The Ports Regulator is committed to the principles of public accountability. Each year it will, amongst other things, commission an independent, developmental evaluation of its performance, and its corporate governance processes.

On behalf of the Ports Regulator, I encourage all interested parties and individuals to provide responses to this Discussion Paper. They will be most welcome.

Thank you.

**GLORIA TOMATOE SEROBE**  
CHAIRMAN  
PORTS REGULATOR OF SOUTH AFRICA

MARCH 2008

## **2. REGULATORY PRINCIPLES FOR THE PORTS REGULATOR**

### **2.1 The Ports Regulator believes that economic regulation should be exercised such that the benefits of regulation exceed the costs.**

The Ports Regulator maintains that, as a general rule, only regulation which produces a net benefit in terms of the government's national commercial ports policy should be exercised. This is consistent with the principle that: "*Regulation should be kept to a minimum, without compromising national aspirations, safety, health, security, efficiency and environmental sustainability*" [*White Paper on National Commercial Ports Policy, 2002, p.13*]. The Ports Regulator will, nevertheless, take equity considerations into account as necessary in applying the general rule.

The Ports Regulator will conceptualise benefits in terms of the government's policy objectives for South Africa's commercial ports and will consider all relevant costs in its decision-making. Benefits and costs must necessarily be conceptualised and measured in qualitative as well as quantitative terms. Measuring the costs and benefits of regulation [including compliance costs] is not a straight-forward task. Often, moreover, one stakeholder[s] may enjoy the benefits of regulation while some or all of the costs are borne by others. The Ports Regulator will apply its mind in good faith to such matters.

### **2.2 The Ports Regulator will embrace the doctrine of competitive neutrality.**

Competitive neutrality means that public sector organisations which compete with the private sector should not have competitive advantages, or disadvantages, by virtue of their government ownership or control unless government policy specifically dictates otherwise.

### **2.3 The National Ports Act requires the Ports Regulator to address certain matters of equity.**

Important matters of equity can arise, for example, when considerations of third party access to infrastructure arise. The Ports Regulator will give special consideration to the principles by which third party claims for access to existing

infrastructure are determined and will expect evidence to be presented on this matter in relevant cases.

In the context of the government's Black Economic Empowerment policies, moreover, one of the Ports Regulator's priorities will be to remove artificial barriers to the entry of new participants in the economy of the ports. In general, all barriers to entry will need to be considered in terms of their impact on firms wishing to establish or to expand their business in the ports.

The benefits and costs of regulation and the individuals and social groups to which they accrue all need to be identified in the regulatory process. A regulation which confers benefits on one party may impose costs disproportionately on another without compensation. Even though, at an aggregate level, the benefits may exceed the costs in this case, the regulation may not be acceptable on equity grounds unless compensation arrangements are feasible.

**2.4 Section 72 of the National Ports Act, 2005 provides that the Transnet National Ports Authority must "..., with the approval of the Ports Regulator, determine tariffs for services and facilities offered by the Authority and annually publish a tariff book containing those tariffs." The Act also requires the Ports Regulator to approve any proposed amendments to the tariff book which may be proposed by the TNPA from time to time.**

The Ports Regulator will emphasise a price cap form of regulation, although it recognises that this is not entirely divorced from rate-of-return approaches. The price cap emphasis is favoured, on balance, because, amongst other things, of the incentives which it provides to organisations to devise and implement cost minimising/productivity enhancing strategies. The Ports Regulator will place great emphasis in its evaluation of proposed tariffs on evidence that such strategies are being implemented to good effect. The Ports Regulator will not permit tariff increases to subsidize poor management practices, sub-standard management information systems, any other inefficiencies including those which are associated with monopolistic or quasi-monopolistic industry structures and/or practices, and so on.

As a general rule, the Ports Regulator will require that proposals to vary tariffs must demonstrate, amongst other things, that such variations serve the



government's national commercial ports policy and the objects of the National Ports Act, 2005, and do not contain a monopoly premium.

**2.5 The regulation of service quality is a means by which regulated competition in the provision of port services may be promoted.**

Performance standards are typically involved in this type of regulation. Such standards can be reviewed periodically by the Ports Regulator on its own initiative or by application from an interested party. The Ports Regulator acknowledges that minimum standards must relate to those variables over which regulatees have a meaningful degree of control, and that the application of minimum standards to each and every stage in the ports production process would not always generate net benefits. Appropriate minimum standards are best determined through a process which includes public consultation.

Defining performance standards is also an appropriate means of regulating matters of servicing times and safety. The Ports Regulator would not necessarily wish to be prescriptive in the choice of techniques used to meet, or exceed, the standards. Such decisions, in the first instance, are best left to the relevant port organisations.

**2.6 The Ports Regulator, as a general rule, will initially seek to employ a "light touch" form of regulation.**

If, however, inappropriate advantage is taken of this, or it proves to be ineffective for other reasons, then the Ports Regulator will consider more prescriptive forms of regulation.

**2.7 Economic regulation can be effected by means which include incentive-based, market oriented instruments or command-and-control instruments.**

In submissions to, and in hearings conducted by, the Ports Regulator, evidence may be presented as to which matters are best handled by incentive-based, market oriented instruments, which are best handled by command-and-control instruments, and which are most efficiently regulated by a mix of instruments. This may include, but are not limited to, evidence concerning the extent, and in which instances, the Ports Regulator should rely on, and encourage, self-

regulation. Agreements negotiated through self-regulation processes may, nevertheless, be subject to a public interest test at the discretion of the Ports Regulator.

**2.8 Reliance on statutory powers exclusively may be an inefficient way of securing compliance with regulatory decisions. Under some circumstances, there may be other incentives for regulatees to comply.**

The Ports Regulator will explore the appropriateness of voluntary agreements as a means of negotiated, joint regulation by the Ports Regulator and relevant parties. It will also use moral suasion to encourage compliance with its decisions, and will analyse the lessons which can be learned from international experience of ports regulation in matters of implementation and compliance.

**2.9 Regulatory Impact Statements [RIS].**

In many international jurisdictions, if a proposed regulation is likely to impose appreciable costs on the community or part of the community, a Regulatory Impact Statement must be prepared before the regulation is made. Its purpose is to explain the need for the regulation and to set out the benefits and costs which would flow from its adoption. It also explains if any alternatives to regulation were considered and why they were rejected. The Ports Regulator proposes to follow this practice. It may also produce *ex post* RIS whereby the actual costs and benefits of regulation are determined in the light of experience in especially important cases.

**2.10 Potential Anti-Competitive Behaviour in Commercial Ports: The Ports Regulator and the Competition Commission**

Section 30 [2] [b] of the National Ports Act, 2005 requires the Ports Regulator to “... *negotiate and conclude an agreement with the Competition Commission ... to co-ordinate and harmonise the exercise of jurisdiction over competition matters, ...*”.

Without in any way attempting or wishing to pre-empt any aspect of these negotiations, the Ports Regulator notes that, in the absence of economic

regulatory oversight, a port operator with a dominant or monopoly position could attempt to engage in certain anti-competitive practices, the effect of which could be to drive out potential competitors and increase costs to port users and the economy at large. Such practices could include:

- Price gouging - using monopoly power to charge excessive tariffs for port services.
- Service bundling - extending monopoly power in one area of port operations to another potentially competitive area. This is also referred to as a tying arrangement.
- Increasing entry barriers - constructing hurdles to increase the share of the market needed to operate at maximum efficient scale, raising absolute costs of entry, or by tending to foreclose competitors from needed resources or outlets.
- Raising rival's cost - increasing the cost of services required by a rival to place him/her at a competitive disadvantage.
- Exclusive dealing - requiring suppliers to sell only to them and not to any potential competitor.
- Predatory pricing - selling services below cost to induce a rival's exit from the market, deter future entry or dissuade a rival from future competition.
- Price discrimination - similar to predatory pricing in that selective price discrimination by a powerful seller can eliminate competition or otherwise entrench the discriminating seller's monopoly power.

The Ports Regulator also notes that issues of competition *between* South Africa's commercial ports may impact on the achievement of the government's commercial ports policy. The National Ports Act, 2005, furthermore, requires the Ports Regulator to "*promote regulated competition*" [Section 30 [2] [e]]. The detailed meaning to be given to this legislative instruction is a further matter which will be discussed with the Competition Commission.

In some circumstances, proposed regulatory measures may be likely to restrict competition. The Ports Regulator would be reluctant to act in this way unless it can be demonstrated that the government's commercial ports objectives can best be achieved by restricting competition. This matter will also be a subject of the discussions which the Ports Regulator must conduct with the Competition Commission under Section 30 of the National Ports Act, 2005.

- 2.11 There are other regulatory matters, such as some environmental issues in the ports, which may come under the jurisdiction of the Ports Regulator, but which may be better handled by means of agreements with other regulatory bodies.**

The Ports Regulator will identify all the other regulatory bodies which have mandates which overlap in any way that of the Ports Regulator. It will negotiate the principles by which matters of overlapping responsibility will be governed.

- 2.12 Regulating in pursuit of a given government policy objective may inhibit the achievement of another [others].**

The Ports Regulator will seek to take into account the likely effects of its regulatory decisions on the wider economy. Where significant trade-offs between government policy objectives may arise in the ports regulatory process, the Ports Regulator will invite government to be independently represented in such proceedings to define the dimensions of any necessary policy trade-offs.

- 2.13 Regulation does not take place in a regulatory vacuum. There is an existing pattern of regulation within a given industry and elsewhere in the economy. Any new regulations may change this significantly.**

The Ports Regulator will consider evidence in any hearing, or otherwise, which will assist it to take into account the likely impact of a proposed regulation on existing regulatory outcomes.

- 2.14 The Ports Regulator is aware that regulation may have unintended consequences.**

The Ports Regulator will be sensitive to the need to identify and manage the possibility of unintended consequences of its regulation.

An enterprise, moreover, subject to the regulation of certain aspects of its activities may respond strategically and seek to circumvent the impact of regulation by altering prices, costs, contracts and so on in those of its activities

which are not regulated. The Ports Regulator will seek to manage any undesirable strategic responses to regulation without inappropriate “tit-for-tat” responses.

**2.15 Industry, and other, pressures may be placed on the Ports Regulator for regulation which favours certain interests.**

Certain organisations, for example, may argue strongly for regulation which insulates them from desirable types and levels of competition. The literature on economic regulation also raises the risk that regulators may be subject to forms of external and/or internal “capture”. The Ports Regulator acknowledges a responsibility to advance the government’s national commercial port’s policy without fear or favour.

**2.16 Clients of the Ports Regulator may claim “commercial-in-confidence” standing for information requested by the Ports Regulator, or for information supplied to the Ports Regulator.**

The Ports Regulator will consider applications for “commercial-in-confidence” status to be granted to information supplied to the Ports Regulator on a case by case basis in terms of the Ports Regulator’s Directives.

**2.17 An enterprise can possess information on, say, technology which a regulator does not have and cannot directly observe. A possible consequence is that the regulatee can extract an informational rent, by manipulating the information it provides to the regulator in order to obtain favourable regulatory measures.**

The Ports Regulator will take steps to identify and to efficiently mitigate this risk.

**2.18 Transnet National Port Authority is the sole landlord in all South African commercial ports. Transnet Port Terminals [TPT] is a significant operator in all South Africa’s commercial ports. As appropriate, the Ports Regulator will require convincing evidence that the commercial and other relevant relationships between**

**TNPA and TPT, and the commercial strategies employed by TNPA and/or TPT to achieve their objectives, are necessarily in the public interest.**

- 2.19 **Apart from those provisions of the National Ports Act, 2005 which require the Ports Regulator to take the initiative, the Ports Regulator will rely principally on interested parties to bring matters before it through the appeal and complaints processes as defined in the Act, Regulations and Directives. There may, by the same token, be occasions on which the Ports Regulator will take the initiative on its own authority and conduct hearings on, or otherwise deal with, certain matters within its jurisdiction.**
- 2.20 **When the Ports Regulator exercises its powers under the National Ports Act, 2005, in especially significant cases it will consider issuing a discussion paper and/or a preliminary statement of findings for stakeholder and/or public response.**
- 2.21 **South Africa's reputation as a destination for both domestic and foreign investment will be influenced by the credibility of the Ports Regulator and its decisions.**

The Ports Regulator will do all that it reasonably can to ensure credibility with existing and potential investors and other stakeholders in South Africa's commercial ports. It will consult with, and will appreciate feedback from, all South Africans and other interested parties on how regulatory credibility can be enhanced.

- 2.22 **The Ports Regulator will seek public submissions every 5 years on the quality and relevance of its regulatory policies and methods.**

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