

DIRECTIVES FINAL DRAFT
12 March 2008

GENERAL NOTICE

NOTICE 473 OF 2008

DEPARTMENT OF TRANSPORT

NATIONAL PORTS ACT, 2005 (Act No. 12 of 2005)

DIRECTIVES IN TERMS OF SECTION 30(3)

The Ports Regulator established by section 29 of the National Ports Act, 2005 (Act No. 12 of 2005), with the concurrence of the Minister of Transport, intends issuing the directives in the Schedule in terms of section 30(3) of the National Ports Act, 2005.

The Ports Regulator invites comments from all interested parties on the Directives as part of a public consultation process.

Responses 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
- d) by hand to: 11th Floor, The Marine, 22 Gardiner Street, Durban

The closing date for receipt of submissions is : 16 May 2008

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GOVERNMENT NOTICE

DEPARTMENT OF TRANSPORT

No. [•]

[•] 2006

NATIONAL PORTS ACT, 2005 (Act No. 12 of 2005)

DIRECTIVES IN TERMS OF SECTION 30(3)

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1. Definitions

In these directives, any word or expression to which a meaning has been assigned in the Act shall have the meaning so assigned unless the context indicates otherwise.

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

“**appeal statement**” means the statement prepared by an appellant in accordance with section 8(1) of these directives;

“**day**” means any working day excluding Saturdays, Sundays and public holidays;

“**decision**” has the meaning given to this term in section 1 of the Promotion of Administrative Justice Act, 3 of 2000 and includes a failure to take a decision;

“**hearing panel**” means the panel established by the Regulator in terms of section 12 of these directives for the purposes of conducting any hearing in terms of chapter 3 of these directives;

“**mediation notification**” means the notice issued to the complainant and the Authority by the Regulator in terms of section 3(1)(a) of these directives;

“**person**” means any individual or juristic person;

“**port user**” means any person who on an ongoing basis, or from time to time, directly or indirectly, utilises port services and facilities; and

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“**provider of port services**” means a person other than the Authority who, pursuant to a licence issued by the Authority in terms of section 57 of the Act or an agreement concluded with the Authority in terms of section 56 of the Act, provides port services within any port.

Reference to the masculine gender shall, as appropriate, be construed to include the feminine and neutral genders.

CHAPTER 1 - COMPLAINTS AGAINST THE AUTHORITY
(Sections 30(3)((a)-(d) read with sections 47 and 48 of the Act)**2. Complaints against the Authority**

- (1) Any person whose rights or interests are adversely affected by any action of or failure to act by the Authority may lodge a complaint against the Authority with the Regulator on any of the grounds specified in section 47(2)(a), 47(2)(b) or 47(2)(c) of the Act, or on the ground that the Authority has failed to carry out, has unfairly carried out or has misapplied itself to any of the functions of the Authority set out in section 11 of the Act.
- (2) A complaint must be lodged within three months of the incident, matter or conduct complained of or within such longer period as the Authority may agree in writing, provided that any complaint which arose after 30 September 2006, but prior to the publication of these directives, may be lodged within three months after publication of these directives.
- (3) A person who lodges a complaint with the Regulator may request in writing that the Regulator treat his or her identity as confidential; but that person may not formally participate in any subsequent investigation or hearing as a complainant and may not request or be granted any specific relief by the Regulator unless he or she waives the request in writing before any hearing commences.
- (4) If a person has requested, in terms of subsection (3), that the Regulator treat his or her identity as confidential —
 - (a) the Regulator shall accept that request; and

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- (b) shall not reveal his identity unless the person subsequently waives the request in writing.
- (5) A complaint must be submitted to the Regulator on the official complaint form, attached as Form 1 to these directives, and must –
- (a) set out the nature of the complaint and the ground/s on which it is brought;
 - (b) detail the manner in which the complainant has been affected by the action or failure to act;
 - (c) set out, subject to subsection (3), the relief sought by the complainant; and
 - (d) be accompanied by the fee for complaints prescribed in Schedule A hereto.
- (6) The Regulator may consolidate two or more complaints under a common investigation if they concern the same subject matter.
- (7) In lodging a complaint, a complainant may request that an urgent and foreshortened process (an “expedited complaint”) be followed by the Regulator in investigating, considering and making a decision on the complaint. Any such request must be accompanied by reasons for the request. Before taking a decision regarding the request, the Regulator shall give the Authority an opportunity to comment on the request and any timetable which may be proposed by the Regulator for finalizing any investigation and decision.
- (8) The Regulator shall acknowledge receipt of any complaint within 5 days of receipt thereof.

3. The Regulator to determine whether a complaint is valid

- (1) The Regulator shall consider whether a complaint is *prima facie* valid and merits further action by the Regulator and, if it so determines, the Regulator shall –
- (a) shall within 21 days of receipt of the complaint, notify the Authority of the complaint, and notify both parties that it has determined that the matter could be settled through a mediation process conducted by a third party appointed by the

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Regulator; or

- (b) shall investigate the matter in any lawful manner and may for that purpose –
- (i) delegate in accordance with section 45 of the Act the power to conduct an investigation into the complaint;
 - (ii) engage and utilise the services of experts or professional persons to assist in the performance of its investigative function in accordance with section 38 of the Act;
 - (iii) request additional information in respect of the complaint from the Authority, the complainant or any other relevant party;
 - (iv) request, in accordance with section 16 of these directives, access to all documentation, records, reports, accounting records, meeting minutes and related information which the Regulator believes it requires for it to conduct the investigation;
 - (v) interview members of the Authority, the complainant and other interested parties;
- (c) may, at any time after the initiation of the complaint and investigation thereof, conduct a hearing into the matter in the manner set out in chapter 3 of these directives.
- (2) In determining, in terms of subsection (1), whether a complaint is valid and merits further action the Regulator shall consider, amongst other things, whether —
- (a) the complaint concerns one of the grounds referred to in directive 2(1);
 - (b) the complainant has sought to draw the complaint to the attention of the Authority before making the complaint. If this has not been done the Regulator may advise the complainant to withdraw the complaint and address it to the Authority before reinstituting the complaint; if the complainant thereafter refuses to do so without good cause, the Regulator may refuse to consider the complaint.

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- (c) the Authority will be prejudiced as a result of the non-disclosure of the complainant's identity by an investigation into a complaint where the complainant has requested the Regulator to treat his or her identity as confidential;
 - (d) a similar complaint is presently under investigation or has recently been resolved and so no further investigation is justified; and
 - (e) the complaint is trivial, vexatious, misconceived or lacking in substance.
- (3) In determining, in terms of subsection (1)(a), that a complaint is suitable for referral to mediation the Regulator shall consider, amongst other things, whether —
- (a) the facts of the complaint are readily ascertainable or will require investigation;
 - (b) the complaint relates only to a matter between the complainant and the Authority; and
 - (c) there is any public interest in an investigation of or hearing regarding the complaint.
- (4) If the Regulator determines in terms of subsection (1) that a complaint is not valid and does not merit further action, the Regulator shall, within 21 days of receipt of the complaint, inform the complainant of its determination giving reasons for its decision.
- (5) The Regulator may, at any time during the investigation of a complaint, terminate the investigation if:
- (a) in the Regulator's view new information or changing circumstances mean that the complaint is no longer valid or no longer merits investigation; or
 - (b) the complainant withdraws the complaint and the Regulator determines that there is no public interest in the investigation continuing.
- (6) The Regulator shall promptly notify the complainant, the Authority and any other party that was actively participating in the investigation of a decision in terms of subsection (5) and of the reasons for that decision.

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4. Mediation of a complaint

- (1) If both the complainant and the Authority notify the Regulator, within 21 days of the issue of the mediation notification in terms of section 3(1)(a) of these directives that they consent to mediation of the complaint the Regulator shall appoint a mediator to facilitate such mediation.
- (2) The procedure for any mediation conducted in terms of subsection (1) shall be determined by the mediator appointed by the Regulator, who shall be independent of the Regulator.
- (3) The Regulator, upon being informed by the mediator of the completion of the mediation and the terms of any settlement agreement which may have been reached by the parties, shall issue a Finalisation Notice to the parties setting out the settlement agreement reached between the parties. The terms of the settlement agreement shall be submitted to the Regulator which shall thereupon test the terms thereof against its principles and the Act. If the Regulator approves the agreement, same shall be published as a decision of the Regulator. If the Regulator does not approve the agreement, it may order that the agreement be amended in whole or in part or that the complaint then be referred to an oral hearing of the Regulator for a decision.
- (4) A party to any mediation instituted in terms of subsection (1) may, at any time before the conclusion of a settlement agreement in terms of subsection (3), issue a Notice of Withdrawal from Mediation to the mediator, the Regulator and the other party, whereupon the Regulator shall proceed to investigate the complaint in accordance with section 5 of these directives.
- (5) A complainant who consents to mediation in terms of subsection (1) and who does not issue a Notice of Withdrawal from Mediation before the conclusion of the settlement agreement in terms of subsection (3) may not lay a further complaint against the Authority concerning the same action or inaction of the Authority in respect of which the mediation was conducted, unless the complaint is that the Authority is in breach of any of the terms of the settlement agreement referred to in subsection (3).

5. Investigation of a complaint

- (1) If the Regulator determines in terms of section 3(1)(b) of these directives that a complaint

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will be investigated it shall, within 21 days of receipt of the complaint, notify the complainant and the Authority of its determination and shall provide a copy of the complaint to the Authority and request the Authority to provide it with an answer to the complaint and with such additional information and documentation related to the complaint as is required by the Regulator, within the period specified in the notice which period shall not be less than 21 days.

- (2) The Authority must provide the Regulator with all answers, information and documentation that the Regulator requires for the purposes of investigating the complaint but may request, in accordance with section 24 of these directives, that certain information, documentation and/or certain portions of the Authority's answer contemplated in subsection (1) be treated by the Regulator as confidential.
- (3) The Regulator shall provide the complainant with a copy of the Authority's answer (save for those portions of the answer that the Regulator has determined to be confidential following a request from the Authority in terms of subsection (2)) and request the complainant to respond to the answer within the period specified by the Regulator, which period shall not be less than 21 days.
- (4) If the relief requested by any complainant will materially and adversely affect the rights or legitimate expectations of any third party, the Regulator must ensure that all such affected persons are informed of the substance of the complaint and the relief sought and have an opportunity to submit their views and any relevant evidence on the matter before a decision is taken.
- (5) The Regulator may direct that a hearing be held into any complaint under investigation.
- (6) Before directing that a hearing be held, the Regulator shall notify the Authority of its intention to so direct, ensure that the Authority has been provided with a copy of the complaint.
- (7) In determining whether a hearing should be held into the complaint the Regulator shall consider, amongst other things, whether —
 - (a) the complaint concerns a matter of port-wide or national concern;
 - (b) the complainant has requested a hearing and in the view of the Regulator this

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- request is justified;
- (c) the cost involved in holding a hearing, including its impact on efficient port management and administration.
- (9) The Regulator must give notice of a hearing constituted pursuant to subsection (5) in at least one newspaper which is distributed, or in newspapers which collectively are distributed, in the area of the port or ports affected by the complaint or requested relief.
- (10) A notice published in terms of subsection (9) must —
- (a) be in at least two of the official languages taking into account the language preferences and usage in the province or area concerned;
 - (b) state particulars of the matter that is being investigated and the place where members of the public can access copies of the complaint and any response to the complaint provided by the Authority, save for those portions of the response which the Authority has requested be treated as confidential in terms of subsection (2) and to which the Regulator has agreed;
 - (c) state the venue of the hearing and the time and date on which the hearing will commence;
 - (d) if the Regulator considers it appropriate in the circumstances of the complaint, invite members of the public to make written submissions to the Regulator regarding the subject-matter of the hearing and the date for such submissions, which should be not less than 30 days after the date of publication of the notice;
 - (e) invite members of the public to attend the hearing; and
 - (f) invite members of the public who wish to participate in the hearing to make an application to the chairperson of the hearing panel in accordance with section 14(2) of these directives.
- (11) To ensure that the hearing constituted in terms of subsection (5) is brought to the attention of the public, the Regulator may, in addition, publicise the information referred to in subsection (10) by way of communications through the printed or electronic media,

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including by way of press releases, press conferences, the Internet, radio or television broadcasts, posters or leaflets.

- (12) If the Regulator determines that a hearing will be conducted, the Regulator shall advise the complainant and the Authority of its determination and of the date, time and place where the hearing will be held, and of the fact that the Authority and the complainant are entitled to legal or other representation at the hearing.
- (13) Any such hearing will be conducted in the manner set out in sections 49, 50, 51, 52 and 53 of the Act, as well as in chapter 3 of these directives, and shall take proper cognizance of the Regulator's Regulatory Principles as published on its web site.

6. Regulator to take decision in respect of the complaint

- (1) Subject to section 3(5) of these directives, the Regulator shall, in respect of any complaint which the Regulator determines, in terms of section 3(1)(b) of these directives, should be investigated, after due consideration of all submissions, evidence and reports before it, and after considering the recommendations of the hearing panel, if such a panel was appointed, uphold or dismiss the complaint and make an appropriate order in accordance with section 54 of the Act.
- (2) The Regulator shall take and communicate its decision, in the manner set out in section 41 of the Act, to the complainant, the Authority and any other party that participated in any hearing.
- (3) The Regulator shall, subject to exigencies surrounding investigation of complaints, take a decision in terms of subsection (1) as soon as reasonably possible after receipt of the complaint.

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CHAPTER 2 - APPEALS AGAINST DECISIONS OF THE AUTHORITY
(Sections 30(3)(a)-(d) read with section 46 of the Act)**7. Lodging of an appeal**

- (1) A port user or licensed operator whose rights are adversely affected by a written decision of the Authority and who wishes to appeal against the decision must lodge a Notice of Intention to Appeal with the Regulator within twenty-one days after that person has been notified in writing by the Authority of the decision.
- (2) A port user or licensed operator whose rights are adversely affected by an unwritten decision of the Authority, and who wishes to appeal against the decision, must request written confirmation of the decision from the Authority not more than twenty-one days after being informed of the decision, becoming aware of the decision or after the port user or licensed operator might reasonably be expected to have become aware of the decision. Whether or not such written confirmation is received, a Notice of Intention to Appeal must be lodged by the port user or licensed operator with the Regulator within fourteen days after that person requested written confirmation from the Authority of the decision.
- (3) A Notice of Intention to Appeal must be —
 - (a) given on the official appeal form attached as Form 2 to these directives; and
 - (b) accompanied by —
 - (i) a brief description of the decision appealed against and the grounds of the appeal;
 - (ii) a copy of a written document recording the decision of the Authority, if any; and
 - (iii) the fee prescribed for appeals in Schedule A hereto.
- (4) The Registrar will serve a copy of the Notice of Intention to Appeal referred to in subsections (1) or (2) on the Authority.

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- (5) Service of the Notice of Intention to Appeal does not suspend the operation of the decision appealed against unless the Regulator determines on application by the appellant that the decision be suspended pending the finalisation or lapse of the appeal.
- (6) The Authority shall be notified of any suspension application made in terms of subsection (5) and shall be given an opportunity to make representations in writing prior to the Regulator determining that any decision of the Authority be suspended.
- (7) Nothing in these directives shall be interpreted as allowing the Regulator to hear an appeal against, or to grant interim relief in respect of, any decision or instruction of the Harbour Master in respect of a matter contemplated in section 74(3) of the Act.
- (8) In lodging an appeal, an appellant may request that an urgent and foreshortened process be followed by the Regulator in considering and hearing the appeal. Any such request must be accompanied by reasons for the request. Before taking a decision regarding the request, the Regulator shall give the Authority an opportunity to comment on the request and any timetable which may be proposed by the Regulator for the exchange of the appeal, responding and answering statements, as well as for the consideration and hearing of the appeal.

8. Submission of an appeal statement

- (1) Within 30 days of the lodging of the Notice of Intention to Appeal the appellant must file with the Regulator a detailed statement on affidavit or by way of affirmation elaborating on the grounds of appeal and appending all relevant supporting documentation referred to in the appeal statement or relied upon by the appellant and which is not in the possession of the Regulator. The Regulator shall serve on the Authority copies of all documents provided to it by the Appellant.
- (2) If the appellant fails to file the appeal statement within the prescribed time period and fails to apply, before the expiry of the time period contemplated in subsection (1), for condonation in terms of section 18 of these directives the appeal lapses and any determination made by the Regulator in terms of section 7(5) of these directives also lapses.

9. Responding and answering statements

- (1) The Authority may submit to the Regulator a responding statement on affidavit or by way of affirmation within 30 days from the date the appeal statement was

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served on it and must serve a copy of its responding statement on the appellant at the same time as filing it with the Regulator.

- (2) Should the Authority fail to submit a responding statement within the time period contemplated in sub-paragraph (1), it may not thereafter do so unless it makes written application to the Regulator, supported by reasons for the application as appropriate, and the Regulator thereupon in writing condones the late submission of such responding statement.
- (3) If in its responding statement the Authority introduces any new information not dealt with in the appeal statement, the appellant may submit to the Regulator an answering statement in response to such new information within 15 days of receipt of the responding statement.
- (3) The appellant must serve a copy of the answering statement on the Authority at the same time as filing it with the Regulator.

10. Processing of appeals

- (1) Receipt by the Regulator of a Notice of Intention to Appeal, an appeal statement, a responding statement or an answering statement, if any, shall be acknowledged in writing within ten days of receipt of the Notice or statement to the chosen address of the person who delivered the document in question.
- (2) Once the Regulator has received the responding statement and answering statement, if any, or the relevant time periods for the submission of such documents lapses, the Regulator shall within ten days notify the parties of the date, time and place where the hearing required in terms of section 49 of the Act will be held, and of the fact that the Authority and the appellant are entitled to legal representation at the hearing.
- (3) Such hearing shall be conducted in the manner set out in sections 49, 50, 51, 52 and 53 of the Act, as well as in chapter 3 of these directives and with due regard to the Regulator's Regulatory Principles..
- (4) The Regulator may, at any time before taking its decision on the appeal, request the appellant or the Authority to submit such additional information in connection with the appeal as the Regulator may require.

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11. Decision on appeals

- (1) The Regulator shall after due consideration of all statements, evidence and reports before it and after considering the recommendations of the hearing panel —
 - (a) confirm, set aside or vary the decision appealed against; or
 - (b) substitute the decision of the Authority with its own.
- (2) The Regulator shall take and communicate its decision, in the manner set out in section 41 of the Act, to the appellant and the Authority and any other party that participated in the hearing.
- (3) Subject to any exigencies or delays associated with the investigation of an Appeal or summoning of parties thereto, the Regulator shall make a decision in terms of subsection (1) as soon as reasonably possible after the receipt of the Notice of Intention to Appeal.

CHAPTER 3 - HEARINGS OF THE REGULATOR**(Sections 30(3), 30(3)(f), read with sections 49, 50 and 51 of the Act)****12. Composition of the hearing panel**

At least ten working days before a scheduled hearing, the Regulator shall appoint (i) a Member of the Regulator as chair, (ii) any other Members of the Regulator if and as the Regulator deems necessary, to constitute the hearing panel. Such number of other persons deemed to be appropriate by the Regulator may be appointed as expert advisers to the hearing panel.

13. Summoning of witnesses and production of evidence

- (1) If the Regulator, the Authority, a complainant or an appellant requires a witness who is likely to have knowledge or information that is relevant to the dispute that forms the subject of the hearing to attend any hearing to give evidence, they may request the chairperson of the hearing panel, if appointed at the time the request is made, or the Regulator to issue a summons for that purpose in the form attached as Form 3.
- (2) If a witness is required to produce in evidence any document or thing in the witness's possession, the summons must specify the document or thing to be produced.

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- (3) After the summons has been issued, it must be served by the sheriff in any manner authorised by Rule 4 of the Uniform Rules of the High Court.
- (4) A witness who has been required to produce any document or thing at the proceedings must hand that document or thing over to the Regulator as soon as possible after service of the summons, unless the witness claims in writing to the Regulator that the document or thing is legally privileged.
- (5) If the witness claims that the document or thing is legally privileged, he must in writing:
 - (a) Identify the document or thing;
 - (b) State by way of affidavit or affirmation why he claims that the document or thing is legally privileged.
- (6) If the Regulator decides on the strength of the documents presented in (5) that such document or thing is legally privileged, the witness shall not be required to produce same. If the Regulator decides that such document or thing is not legally privileged, the witness shall be required to produce same within ten working days of such decision.

14. Participation in a hearing

- (1) In addition to those persons specifically mentioned in section 50 of the Act, the appellant in any appeal may participate in the hearing of the appeal in the manner set out in section 50 of the Act.
- (2) Any other person with a material interest in any hearing conducted by the Regulator who wishes to participate in the hearing in the manner set out in section 50(d) of the Act must apply in writing to the chairperson of the hearing panel at least ten days before the scheduled date of the hearing informing the chairperson of his or her wish to participate in the hearing and of the material interest which that person has in the subject matter of the hearing. A copy of the application must be served by the applicant on the Authority and on any appellant or complainant.
- (3) At the commencement of the hearing the chairperson of the hearing panel shall consider all applications made in terms of section 50(d) of the Act and make a ruling as to whether or not the person may participate in the hearing.

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15. Procedure to be adopted before a hearing panel

- (1) All the evidence and addresses at a hearing of the Regulator shall be heard in public:
Provided that:
- (a) the chairperson of a hearing panel may, in his or her discretion, exclude from the place where such evidence is to be given or such address is to be delivered any class of persons or all persons whose presence at the hearing of such evidence or address is, in his or her opinion, not desirable;
 - (b) all persons other than the parties and the hearing panel shall be excluded from that part of any hearing which concerns material the Regulator has previously determined to be confidential or which the hearing panel considers to be confidential; and
 - (c) any person who wilfully interrupts the proceedings before a hearing panel or who wilfully hinders or obstructs a hearing panel in the performance of its functions may be ordered by the chairperson of the hearing panel to leave the hearing.
- (2) At the hearing of any complaint or appeal —
- (a) the complainant or appellant as the case may be shall be given an opportunity to present his or her case before the hearing panel and to produce such witnesses, documents, books or items as assist in such presentation;
 - (b) the Regulator and the Authority shall be given an opportunity to put questions to any witnesses and to examine any document, book or item presented by the complainant or appellant and the Authority may make submissions regarding these;
 - (c) the Authority shall be given an opportunity to answer the case presented by the complainant or appellant, as the case may be, and to produce such witnesses, documents, books or items as assist in such presentation;
 - (d) the Regulator and the complainant or appellant shall be given an opportunity to put questions to any witnesses put forward by the Authority and to examine any document, book or item presented and the complainant or appellant may make submissions regarding these.

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- (e) The law as to admissibility of evidence and as to the competency, examination, cross-examination and re-examination of witnesses in courts of law shall not be binding upon the hearing panel, but the chairperson of the hearing, may, in his discretion, disallow any question which any other member of the hearing panel or any party proposes to put to any witness, on the ground that such question is irrelevant or that for any other cause it would be improper that the question be put, and may, in his discretion and on similar grounds, rule that the production of any book, document or thing required by any other member of the hearing panel or any party shall not be allowed
- (f) any person authorised to participate in the hearing in terms of section 14(3) of these directives shall indicate at the time of making an application in terms of section 14(2) of these directives whether they wish to support or oppose the complainant or appellant's case. If they wish to support the case they shall be given an opportunity to participate in the hearing, after the complainant or appellant, in the same manner as the complainant or appellant set out in subsections (a) and (d) above; if they wish to oppose the case, they shall be given an opportunity to participate in the hearing after the Authority, in the same manner as the Authority set out in subsections (b) and (c) above;
- (3) The chairperson of the hearing may direct that the proceedings of the hearing be voice recorded. If this is done, a full transcript of the proceedings may be obtained from the Regulator by any party on two weeks' notice and upon payment of such fee as is necessary to cover the transcription costs.
- (4) If the hearing panel determines that a hearing introduces any new information not dealt with in the written submissions before the Regulator, the hearing panel may direct that the parties are entitled to submit to the chairperson of the hearing panel, within a period determined by the chairperson, any additional statements rebutting or supporting such new information.
- (5) Following the conclusion of a hearing, and no more than 30 days after the hearing date or the deadline for further submissions, if any, the chairperson of the hearing panel shall prepare a report of the hearing together with the recommendations of the hearing panel and submit it to the Regulator.

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- (6) The hearing panel may make such order for the payment by any party to a hearing—
- (a) of the costs or any part thereof reasonably incurred by the Regulator or any other party in attending or being legally represented at the hearing or in bringing witnesses or adducing evidence; and
 - (b) of any other costs or any part thereof reasonably incurred by the Regulator in connection with the investigation or hearing,
- as may be just.

**CHAPTER 4 - ACCESS BY THE REGULATOR TO
THE CONFIDENTIAL INFORMATION OF THE AUTHORITY**

(Section 30(3)(e))

16. Regulator to have access to confidential information of Authority

- (1) The Regulator shall put in writing any request for specified or generally described information which the Authority has in its possession which relates to the matters over which the Regulator has jurisdiction in terms of sections 30(1) and (2) of the Act.
- (2) The requested information shall be made available to the Regulator during office hours and within 10 working days of the request or such longer period as the Regulator may in writing allow.
- (3) The Authority shall respond to a reasonable request for access made in terms of subsection (1) that, if so requested by the Authority, has been confirmed in terms of subsection (3) within five days of the last occurring of the request or the confirmation, if confirmation is requested, or such longer period as the Regulator may agree in writing. The Authority shall clearly mark as confidential all information which it believes to be confidential information as defined in section 24(1) of these directives.
- (4) The Regulator shall advise the Authority in writing before disclosing any of the information marked as confidential information and provided in terms of subsection (4) to any third party or disclosing it for the purposes of any investigation, appeal, hearing or other public process.

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- (5) Upon receiving notification in terms of subsection (5), the Authority may claim that the information may not be disclosed by the Regulator as it is “confidential information” as defined in section 24(1) of these directives, and shall substantiate any such claim.
- (6) The Regulator shall determine whether the information meets the criteria for “confidential information” set out in section 24(1) and notify the Authority in writing of its determination. The Regulator shall not disclose the information to any third party or disclose it for the purposes of any investigation, appeal, hearing or other public process until a period of ten days has passed since it gave the Authority written notification of its determination.
- (7) If the Regulator determines in terms of subsection (7) that the information is confidential information and notifies the Authority that a written abstract of the information in a non-confidential form is required, the Authority shall within fifteen days of notification of this determination, or such longer period as the Regulator may allow, provide the Regulator with:
- (a) a written abstract of the information in a non-confidential form; or
 - (b) an affidavit or affirmation setting out the reasons why it is impossible to comply with subparagraph (a).

**CHAPTER 5 - MANNER AND FORM OF PARTICIPATION
IN THE PROCEEDINGS OF THE REGULATOR**

(Section 30(3)(f))

17. Opening and location of offices of Regulator

- (1) The offices of the Regulator are open to the public every Monday to Friday, excluding public holidays, from 09h00 to 16h00.
- (2) Any document which is required to be served on, lodged or filed with the Regulator may be –

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- (a) delivered by hand to The Ports Regulator, 11th Floor, The Marine, Gardiner Street, Durban, Republic of South Africa; or
 - (b) transmitted by telefax on 27 31 365 7858;
 - (c) mailed by registered post to The Ports Regulator, P O Box 54322, Durban, 4000; or
 - (d) submitted electronically by way of the website of the Regulator at [www.portsregulator.org.za].
- (3) Any document which is required by these directives to be served on the Authority shall be –
- (a) delivered by hand to The Authority, 30 Wellington Road, Parktown, Johannesburg, Republic of South Africa; or
 - (b) transmitted by telefax on 27 11351 9007
- (4) Any document which is required by these directives to be served on any complainant or appellant shall be delivered by hand or transmitted by telefax at the address or telefax number indicated on the official complaint form or appeal form.
- (5) If the date and time of the delivery of a document is outside of the office hours of the Regulator, that document will be deemed to have been delivered on the next business day.
- (6) A document that is delivered by telefax must include a cover page setting out —
- (a) the name, address, and telephone number of the sender;
 - (b) the name of the person to whom it is addressed, and the name of that person's representative if it is being sent to the representative of a person;
 - (c) the date and time of the transmission;
 - (d) the total number of pages sent, including the cover page; and

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- (e) the name and telephone number of the person to contact if the transmission appears to be incomplete or otherwise unsuccessful.
- (7) If any document delivered in terms of this directive 17. is an originating complaint or Notice of Appeal, it shall be accompanied by the fee prescribed therefor in Schedule A hereto or proof of payment thereof, failing which the Regulator shall not consider same.

18. Condonation of time limits

On written application for condonation in terms of section 54(1)(b) of the Act, the Regulator may, if good cause is shown, condone the late performance of an act in respect of which these directives prescribe any time limit.

19. Register of complaints and appeals

- (1) The Regulator shall maintain separate complaints and appeals registers respectively in which the following information is recorded —
 - (a) all complaints received, with details of: the complaint, a brief description of the nature of the complaint, the date the complaint was received and the outcome of the complaint, provided that, if any complaint received is confidential:
 - (i) the register for complaints shall not reflect the identity of the complainant;
 - (ii) the Regulator must keep a separate and confidential register which identifies confidential complainants;
 - (iii) the register identifying confidential complainants will not be available to the public or the Authority and will not be disclosed by the Regulator pursuant to any requests therefor in terms of the Promotion of Access to Information Act of 2000; and
 - (b) all appeals lodged, with details of: the name of the appellant, a brief description of the decision appealed against and the ground of appeal, the date the appeal was received and the outcome of the appeal.
- (2) Any interested person may inspect the complaints and appeals registers, but not the confidential complainants's register, at the offices of the Regulator during normal office

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hours.

CHAPTER 6 - THE FILING OF PRICES CHARGED BY THE PROVIDER OF ANY PORT SERVICE OTHER THAN THE AUTHORITY**(Section 30(3)(h))****20. Provider of port services to submit prices**

- (1) Any provider of port services must within six months of the commencement of these directives or within six months of the commencement of the service, whichever is the later, submit to the Regulator a detailed and comprehensive list of the prices charged by it for the provision of port services at any port, together with the terms and conditions attaching to such prices.
- (2) The Regulator shall acknowledge receipt of such price list in writing.
- (3) The Regulator may, if it deems it necessary and in the public interest to do so, require the provider of a port service to provide it with a written explanation of how such prices are arrived at and/or a motivation of why such prices are fair and reasonable and in the public interest in the circumstances.
- (4) The Regulator shall, after having considered and assessed the price list and any explanation given regarding the price list, advise the provider of port services if it is of the view that the prices charged by the provider of port services are not fair and reasonable and in the public interest and shall provide reasons for its view.
- (5) If the Regulator determines that the prices charged by the provider of port services are not fair and reasonable and in the public interest, the Regulator shall require the provider of port services to amend its prices.
- (7) The Regulator shall keep all price lists disclosed in terms of this directive, all submissions made in terms of subsection (3) and all advice given in terms of subsection (5) confidential and shall not disclose them to any person unless ordered to do so by a competent court.

**CHAPTER 7 - APPROVAL BY THE REGULATOR
OF TARIFFS CHARGED BY THE AUTHORITY**

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(Section 30(2)(d) read with section 72 of the Act)**21. Approval and amendment of tariffs**

- (1) The Authority shall on an annual basis on or before 1 August, or at such longer intervals as the Authority and the Regulator may agree, submit its tariff book setting out its proposed tariffs for all services and facilities offered by the Authority for the following financial year of the Authority, for approval by the Regulator.
- (2) The Authority shall submit to the Regulator a proposal for the amendment of any tariff for services and facilities offered by the Authority at any port from time to time.
- (3) Any submission to the Regulator in terms of subsections (1) or (2) above shall contain sufficient information for the Regulator to consider the submission; in particular the Authority shall set out in detail —
 - (a) the manner in which the tariff/s have been calculated, and the model used by the Authority for determining and calculating the tariff/s;
 - (b) all operating and capital costs, expenses and revenues, incurred or generated from the port service or port facility, as well as the value of the capital stock;
 - (c) the amounts to be invested and the revenues to be utilised in port development, safety, security and environmental protection;
 - (d) the manner in which the tariff will lower the cost of doing business in the ports;
 - (e) the proposed profit margin or rate of return, together with a motivation to show why this margin or return is commensurate with risk;
 - (f) the manner in which the factors set out in section 22 of these directives apply to the proposed tariff/s; and
 - (g) any additional information which the Regulator may reasonably require to approve the proposed tariff.
- (4) The Authority may in a submission made in terms of subsection (1) or (2), identify information which the Authority believes is confidential information. Any such

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submission shall be made and dealt with in the manner set out in section 24 of these directives.

- (5) The Authority shall maintain such financial and accounting systems as are necessary for the Regulator to verify the pricing principles and models used by the Authority to determine and calculate its tariffs.
- (6) If the proposed tariffs will or are likely to materially and adversely affect the rights of any person the Authority must:
 - (a) provide the Regulator with evidence of the manner in which all such affected persons have been informed of the proposed tariff and given an opportunity to make written or oral submissions regarding the proposed tariff and must provide full details of all such submissions received; or
 - (b) publish notice of the proposed tariff, in a newspaper circulating in the area affected by the proposed tariffs or in some other appropriate manner directed by the Regulator inviting, at the Regulator's discretion, written or oral submissions regarding the proposed tariff.
- (7) A notice published in terms of subsection (6)(b) must —
 - (a) be in at least two of the official languages taking into account the language preferences and usage in the province or area concerned;
 - (b) state particulars of the proposed tariff;
 - (c) invite relevant members of the public to submit written objections to and comments on the proposed tariff in the manner and by the date set out in the notice, which shall not be earlier than 30 days from the date of publication of the notice;
 - (d) if the Regulator determines it is necessary, invite any members of the public who make written submissions also to make oral submissions before the Regulator at the time and date and in the manner set out in the notice; and

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- (e) invite members of the public to attend all meetings at which the oral submissions referred to in (d) are made.
- (8) To ensure that the proposed tariff is brought to the attention of the public, the Regulator may, in addition, require the Authority to publicise the information referred to in subsection (7) by way of communications through the printed or electronic media, including by way of press releases, press conferences, the Internet, radio or television broadcasts, posters or leaflets.
- (9) The Regulator shall provide the Authority with a copy of all written submissions received following a notice issued in terms of subsection (7) and shall provide the Authority with an opportunity to respond in writing to all such submissions.
- (10) The Authority shall be timeously informed of any decision by the Regulator to invite any members of the public who make written submissions to make oral submissions to it and the Authority shall be given the opportunity to be present when all such submissions are made and to make its own submission in support of the proposed tariff.
- (11) The Regulator, shall, after due consideration of all written and/or oral submissions, objections, evidence and reports before it, approve or reject some or all of the proposed tariff/s.
- (12) The Regulator shall take and communicate its decision, in the manner set out in section 41 of the Act, to the Authority, any person who filed an objection to the proposed amendment and any other party that made written or oral submissions to it.
- (13) The Regulator shall take a decision in terms of subsections (1) and (2) within four months of the receipt of the submission.

22. Tariff requirements

- (1) Any tariff submitted by the Authority to the Regulator in terms of section 21 of these directives must —
- (a) be based on a systematic methodology applicable on a consistent and comparable basis;
- (b) be fair;

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- (c) be non-discriminatory unless any discrimination can be shown to be in the public interest;
 - (d) be simple and transparent;
 - (e) be predictable and stable;
 - (f) not allow for cross-subsidisation, unless any cross-subsidisation can be shown to be in the public interest and
 - (g) be such as to promote access to ports and efficiency and performance in the management and operation of ports.
- (2) In considering the Authority's proposed tariffs, and any subsequent proposed significant variations, the Regulator will give due consideration to whether it is desirable that the tariffs which it finally approves enable the Authority to —
- (a) recover its investment in owning, managing, controlling and administering ports and its investment in port services and facilities;
 - (b) recover its costs in maintaining, operating, managing, controlling and administering ports and its costs in providing port services and facilities; and
 - (c) make a profit commensurate with the risk of owning, managing, controlling and administering ports and of providing port services and facilities.

23. Application of the tariff

The Authority must report annually to the Regulator regarding all agreements entered into with licensed operators, parties to an agreement and port users for the variation in terms of section 72(4) of any tariff published in terms of section 72(1) of the Act. Such report must include details of —

- (1) the name of the party to the relevant agreement for such variation of the tariff;
- (2) each tariff in respect of which a variation has been agreed;

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- (3) the nature of the agreed variation; and
- (4) the duration of the agreement.

CHAPTER 8 – CONFIDENTIAL INFORMATION SUBMITTED TO THE REGULATOR
(Section 30(3))**24. Claims of confidential information and determination by the Regulator**

- (1) For the purposes of these directives “confidential information” means information that —
 - (a) belongs to a person or an organ of state; and
 - (b) a person or organ of state could legitimately refuse to disclose on any mandatory or discretionary ground set out in Chapter 4 of the Promotion of Access to Information Act, 2 of 2000; or
 - (c) has a particular economic value; and is not generally available to or known by others, the disclosure of which could —
 - (i) result in a significant adverse effect on the owner of the information, or on the person that provided the information; or
 - (ii) give a significant competitive advantage to a competitor of the owner; or
 - (d) which, if disclosed, would be likely to endanger health, safety or security in a port.
- (2) Any person may in any submission made to the Regulator identify information that the person claims to be confidential information.
- (3) A person, when making a claim in terms of subsection (2), must support that claim with —
 - (a) a written statement in the prescribed form motivating why the information should be recognised as confidential information; and
 - (b) either —

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- (i) a written abstract of the information in a non-confidential form; or
 - (ii) an affidavit or affirmation setting out the reasons why it is impossible to comply with subparagraph (i).
- (4) All information which a person claims is confidential information must be clearly marked as such.
- (5) If a person makes a claim in terms of subsection (2) of these directives, the Regulator will determine whether the information satisfies the requirements of confidential information set out in subsection (1).
- (6) Upon making a determination in terms of subsection (5) or (6)(b), the Regulator —
- (a) will notify the claimant in writing of its determination; and
 - (b) may, if it has determined that the information is not confidential, advise the claimant that the information will be available for public disclosure, but will not disclose such information to a third party until twenty days have passed from the date of receipt of the written confirmation by the claimant.

CHAPTER 9 - General**25. Commencement of these directives**

- (1) With the exception of Chapter 7, these directives shall come into effect on the date of their promulgation in the *Government Gazette*.
- (2) Chapter 7 of these directives shall come into effect on the date of commencement of sections 72 and 73 of the Act.

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SCHEDULE A: SCHEDULE OF FEES AND COSTS**Complaints**

Fee payable for filing an originating complaint document.....R2 000.00

Appeals

Fee payable for filing an originating appeal notice.....R3 000.00

Costs awards

Any award for costs by the Regulator against any person shall be taxable before the Regulator on the basis of the tariff of the High Court of South Africa.

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12 March 2008**FORM 1: NOTICE OF COMPLAINT****NOTICE OF COMPLAINT TO THE REGULATOR AGAINST THE AUTHORITY**

(Section 47 of the National Ports Act, 2005 (Act No. 12 of 2005))

[Directive 2]

STATE YOUR REFERENCE NUMBER IF ANY: _____**A. Particulars of person bringing the complaint**

The particulars of the person making the complaint must be given below. Proof of the capacity in which the complaint is made, if applicable, must be attached.

Full names and surname: _____

Identity number: _____

Postal address: _____

Physical Address for service of documents: _____

Fax number for service of documents: _____

Telephone number: _____

E-mail address: _____

Capacity in which complaint on behalf of another person is made: _____

B. The incident, matter or conduct by the Authority against which the complaint is made.

Briefly state the incident, matter or conduct of the Authority against which the appeal is lodged in the space provided below. The matter complained of must have arisen within 60 days of the date on which this complaint is lodged.

If the space provided below is inadequate, please continue on a separate folio and attach it to this

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form. You must sign all the additional folios. Please attach all documents and other items referred to in the complaint.

C. Ground of complaint

You must set out and motivate the ground of complaint. This ground must be one of the grounds set out in sections 47(2)(a), (b) or (c) of the Act. If the space provided below is inadequate, please continue on a separate folio and attach it to this form. You must sign all the additional folios.

State the grounds for the complaint against the Authority: _____

State any other information that may be relevant in considering the complaint:

D. Nature of the relief sought

In terms of the Act the Regulator is entitled to make certain orders following an investigation into

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a complaint including:

(i) interdicting any conduct or action;

(ii) declaring the whole or any part of any agreement to be void.

Please set out below the nature of the relief, if any, which you seek. If the space provided below is inadequate, please continue on a separate folio and attach it to this form. You must sign all the additional folios.

State the nature of the relief sought:

E. Notice of decision on complaint

You will be notified in writing of the outcome of your complaint. If you wish to be informed by fax or e-mail, please specify this and provide the necessary particulars to enable compliance with your request in the space provided below.

State the alternative manner in which you wish to be informed and the relevant contact details:

F. Hearing

Please state whether you believe a hearing should be held into this complaint. Please motivate this belief having regard to the factors listed in section 5(5) of these directives and any other factors which you consider to be relevant. If the space provided below is inadequate, please continue on a separate folio and attach it to this form. You must sign all the additional folios.

Do you wish a hearing to be held:

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If yes, please provide reasons:

G. Confidential complaint

Please state whether you wish to make a confidential complaint and provide a brief motivation for this. If you do wish your complaint to be a confidential complaint you will not be entitled to be treated as a complainant or to actively participate in any subsequent investigation or hearing and will not be entitled to any specific relief.

Do you wish your complaint to be kept confidential?

If yes, please provide reasons:

Signed at _____ on this the ____ day of _____ 20__.

SIGNATURE OF COMPLAINANT

FOR DEPARTMENTAL USE

OFFICIAL RECORD OF COMPLAINT MADE AGAINST AUTHORITY

Complaint received on _____ (date) by _____
 _____ (state the full name and designation of the official
 of the Regulator who formally received the complaint).

CONFIDENTIAL or Non-Confidential complaint (circle whichever is appropriate).

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Non-confidential complaint to be investigated by the Regulator submitted to _____ (name of the official) from the Authority on _____ (date) by _____ (name of the official from the Regulator).

OUTCOME OF COMPLAINT

COMPLAINT UPHeld / DISMISSED (delete whichever is not applicable).

IF COMPLAINT IS UPHeld, THE ACTION TO BE TAKEN AGAINST THE AUTHORITY:

DATE

**Chairperson of Ports
Regulator**

Received by the Authority from the Regulator on (date): _____.

DRAFT FOR INITIAL PUBLIC CONSULTATION PROCESS**FORM 2: NOTICE OF INTENTION TO APPEAL****NOTICE OF INTENTION TO APPEAL TO THE REGULATOR
AGAINST A DECISION OF THE AUTHORITY**

(Section 46 of the National Ports Act, 2005 (Act 12 of 2005))

[Directive 7]

STATE YOUR REFERENCE NUMBER IF ANY: _____

This Notice of Intention to Appeal is the preliminary appeal document which is lodged to inform the Regulator and the Authority of your intention to appeal a decision of the Authority. Within 30 days of lodging this Notice you must lodge a detailed appeal statement on affidavit or by way of affirmation in which you substantiate the grounds of appeal and provide all necessary supporting documents.

A. Particulars of person lodging the appeal

The particulars of the person who lodges the appeal must be given below. Proof of the capacity in which the appeal is lodged, if applicable, must be attached.

Full names and surname: _____

Identity number: _____

Postal address: _____

Physical Address for service of documents: _____

Fax number for service of documents: _____

Telephone number: _____

E-mail address: _____

Capacity in which an appeal on behalf of another person is lodged: _____

B. The decision against which the appeal is lodged

--

Briefly state the decision of the Authority against which the appeal is lodged in the space provided below. If possible please attach written proof of the decision of the Authority. You are not required to set out the nature of the appeal in detail in this notice but must at least identify the decision.

The decision must have been taken within 10 days of the date on which this complaint is lodged.

C. Grounds for appeal

You are not required, at this stage, to set out the ground upon which this appeal is brought in detail in this notice but must at least identify the relevant grounds.

State any other information that may be relevant in considering the appeal:

D. Notice of decision on appeal

You will be notified in writing by post of the outcome of your appeal. If you wish to be informed by fax or e-mail, please specify this and provide the necessary particulars to enable compliance with your request in the space provided below.

State the alternative manner in which you wish to be informed and the relevant contact details:

Signed at _____ on this the _____ day of _____ 20____.

SIGNATURE OF APPELLANT

FOR DEPARTMENTAL USE
OFFICIAL RECORD OF APPEAL

Notice of Intention to Appeal received on _____ (date) by _____ (state full name and designation of the official of the Regulator who formally received the notice of intention to appeal).

Appeal submitted by the Regulator to _____ (name of the official) from the Authority on _____ (date) by _____ (name of the official from the Regulator).

OUTCOME OF APPEAL

DECISION OF THE AUTHORITY CONFIRMED / VARIED / SET ASIDE (delete whichever are not applicable).

NEW DECISION: _____

<hr/> <hr/> <hr/>	
<hr/>	<hr/>
DATE	Chairperson of Ports Regulator
Received by the Authority from the Regulator on (date): _____.	