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GOVERNMENT NOTICES

DEPARTMENT OF TRANSPORT

No. 824

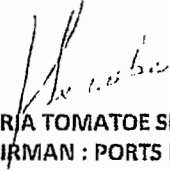
6 August 2009

PORTS REGULATOR

REGULATORY PRINCIPLES

I, Gloria Tomatõe Serobe, Chairman of the Ports Regulator hereby publish the Regulatory Principles developed by the Ports Regulator relating to the principles guiding the Regulator in the proper performance of its functions.

The Regulatory Principles are published for general information and shall come into operation on the date of publication.



GLORIA TOMATOE SEROBE
CHAIRMAN : PORTS REGULATOR

Date: 17 July 2009

**REGULATORY PRINCIPLES OF THE PORTS REGULATOR
2009**

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 National Ports Authority NPA to ensure that it performs its functions in accordance with this Act.

1.2 The Members of the Ports Regulator were appointed in December 2006. Its first meeting was held on 28 March 2007.

The current members of the Ports Regulator are:

- Mrs Gloria Tomatoe Serobe (Chairman)
- Ms Phumzile Langeni
- Ms Tandiwe Njobe
- Mr Andrew Pike
- 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. These principles thus guide the Regulator and inform the expectations that stakeholders can have of the Regulator.

1.4 These Regulatory Principles were developed and determined in the context of the provisions of the National Ports Act, 2005; other relevant legislation; and the policy objectives determined by the

government, and with the input of various stakeholders over the period of its development.

1.5 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 for every year following the publishing of the Directives issued under the National Ports Act.

Thank you.

GLORIA TOMATOE SEROBE
CHAIRMAN

REGULATORY PRINCIPLES FOR THE PORTS REGULATOR

1. **Economic regulation shall 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. **The Ports Regulator shall exercise competitive neutrality between the public and private spheres.**

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.

3. **The Ports Regulator shall 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 compensatory arrangements are feasible.

4. The Ports Regulator shall exercise its tariff approval powers using the Price Cap Approach.

The Ports Regulator will utilise a price cap form of regulation, and incorporate rate-of-return approaches, among others, in its tariff rebasing processes. 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, as well as the information asymmetries that abound in the initial phases of the Regulator's existence.

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. A tariff re-basing shall be performed every five years to set appropriate incentives for a timeous and cost-effective investment programme in appropriate port infrastructure. The first tariff re-basing shall occur two years after the first Directives are published.

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.

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.

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.

7. Economic regulation may 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 the Ports Regulator.

8. The Regulator shall explore all legal alternatives to ensure the spirit and the letter of the National Ports Act is followed.

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.

9. Regulatory Impact Statements [RIS] shall be developed for significant regulatory interventions.

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.

10. The Regulator shall foster competition in the ports sector where appropriate

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.

11. Co-operative engagement with other regulators

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.

12. Consultation on matters of policy trade-offs.

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.

13. Existing regulatory regimes and institutions to be considered and consulted where indirect impacts manifest.

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.

14. System impact perspectives shall inform the Regulator in its decisions.

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.

15. Neutrality as to the interests of all stakeholders in the industry

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.

16. Protection of sensitive information

Stakeholders 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.

17. The Regulator shall actively assess the accuracy and appropriateness of all information submitted

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.

18. All relationships between connected parties will be assessed and considered by the measure of public interest.

The National Port Authority is the sole landlord in all South African commercial ports. Transnet Port Terminals [TPT], a division of Transnet Limited, 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 NPA and TPT, and the commercial strategies employed by NPA and/or TPT to achieve their objectives, are necessarily in the public interest.

19. The Regulator shall actively monitor the ports industry.

The primary form of engagement of the Regulator in its quasi-judicial role will be on initiative of interested and affected parties, but the Regulator shall initiate its own action where it deems appropriate. 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.

20. **The Regulator shall publically engage stakeholders in the process whenever nationally significant issues are under consideration.**

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.

21. **The Regulator shall take consideration of the impacts of its actions on the external and internal views of the economy as an investment destination.**

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.

22. **Periodic regulatory review**

The Ports Regulator will seek public submissions every 5 years on the quality and relevance of its regulatory policies and methods. These shall be aligned with the re-basing cycles, and other regulatory development cycles.

No. 825

6 August 2009

PORTS REGULATOR

DIRECTIVES IN TERMS OF SECTION 30(3) OF THE NATIONAL PORTS ACT, 2005 (ACT 12 OF 2005)

I, Gloria Tomatoe Serobe, Chairman of the Ports Regulator, in terms of section 30(3) of the National Ports Act, 2005 (Act 12 of 2005), hereby issue and publish the Directives developed by the Ports Regulator relating to the proper performance of the functions of the Ports Regulator. The Minister of Transport has concurred with the issue of these Directives.

These Directives are published for general information and compliance and shall come into operation on the date of publication.



GLORIA TOMATOE SEROBE
CHAIRMAN : PORTS REGULATOR

Date: 17 July 2009

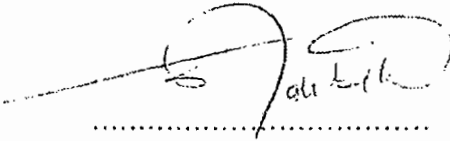
No. 826

6 August 2009

**DIRECTIVES IN TERMS OF SECTION 30(3) NATIONAL PORTS ACTS
(ACT NO. 12 OF 2005)**

I, Sibusiso Joel Ndebele, Minister of Transport, hereby, in terms of section 30(3) of the National Ports Act, 2005 (Act No. 12 of 2005), concur and approve the Directives developed by the National Ports Authority relating to the proper performance of the functions of the Regulator.

These Directives are published for information and compliance and shall come into operation on the date of publication.



.....
Mr. S.J. Ndebele (MP)

Minister of Transport

Date: 13 July 2009

GOVERNMENT NOTICE

PORTS REGULATOR

No. R [•]

[•] 2009

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, hereby issues the directives and the Schedules in terms of section 30(3) of the National Ports Act, 2005.

ARRANGEMENT OF DIRECTIVES

1. Definitions

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
3. Regulator to determine whether a complaint is valid
4. Mediation of a complaint
5. Investigation of a complaint
6. Hearing into a complaint
7. Regulator to take decision in respect of the complaint

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

8. Lodging of an appeal
9. Submission of appeal affidavit
10. Answering and Replying affidavits
11. Processing of appeals
12. Decision on appeals

CHAPTER 3 – HEARINGS OF THE REGULATOR**(Sections 30(3), 30(3)(f), read with sections 49, 50 and 51 of the Act)**

13. Composition of the hearing panel
14. Subpoena of witnesses and production of evidence
15. Participation in a hearing
16. Procedure to be adopted before a hearing panel

CHAPTER 4 – ACCESS BY THE REGULATOR TO CONFIDENTIAL INFORMATION OF THE AUTHORITY**(Section 30(3)(e) of the Act)**

17. Regulator to have access to confidential information of the Authority

CHAPTER 5 – MANNER AND FORM OF PARTICIPATION IN THE PROCEEDINGS OF THE REGULATOR**(Section 30(3)(f) of the Act)**

18. Opening and location of offices of the Regulator
19. Condonation of time limits
20. Register of complaints and appeals

CHAPTER 6 – THE FILING OF PRICES CHARGED BY THE PROVIDER OF ANY PORT SERVICE OTHER THAN THE AUTHORITY**(Section 30(3)(h) of the Act)**

21. Provider of port services to submit prices

CHAPTER 7 – APPROVAL BY THE REGULATOR OF TARIFFS CHARGED BY THE AUTHORITY**(Section 30(3) read with section 72 of the Act)**

22. Approval and amendment of tariffs
23. Tariff requirements
24. Application of the tariffs

CHAPTER 8 – CONFIDENTIAL INFORMATION SUBMITTED TO THE REGULATOR
(Section 30(3) of the Act)

25. Claims of confidential information and determination by the Regulator

CHAPTER 9 - General

26. Commencement of these directives

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 affidavit**” means the statement prepared by an appellant in accordance with directive 9(1);

“**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 13 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 directive 3(1)(a);

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

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

“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; and

“tariffs” means all charges, costs, penalties, levies and prices raised by the Authority to port users.

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, conduct or omission complained of or within such longer period as the Authority may agree in writing, provided that any complaint which arose after 26 November 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 that person’s 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 that person waives the request in writing before any hearing commences.
- (4) If a person has requested, in terms of subdirective (3), that the Regulator treat that person’s identity as confidential –
 - (a) the Regulator shall accept that request; and

- (b) shall not reveal that person's 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 subdirective (3), the relief sought by the complainant;
- (d) be accompanied by the fee, payable in cash or by way of bank guaranteed cheque, for complaints prescribed in Schedule A hereto. In the event that the complainant is unable, as a result of indigency, to pay the prescribed fee, the complainant may apply to the Regulator to waive payment of the fee and the Regulator may, after considering that application, waive payment of the fee; and
- (e) be accompanied by the relevant supporting information and documentation, if any.
- (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 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. 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. Having considered the request and the Authority's comments the Regulator may waive any time periods and procedures set out in these directives and deal with the complaint as expeditiously as the Regulator deems appropriate.
- (8) The Regulator shall acknowledge receipt of any complaint within 5 days of receipt thereof.

3. 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 –
- (a) shall within 15 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 Regulator;
 - (b) shall investigate the matter in accordance with directive 5;
 - (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; and/or
 - (d) may, in terms of Section 53 of the Act, at any time after the initiation of the complaint, make such interim order as it deem necessary in the circumstances, including, but not limited to, interdicting any conduct, action or inaction and declaring the whole or any part of an agreement to be void or suspended.
- (2) In determining, in terms of subdirective (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 reinstating the complaint; if the complainant thereafter refuses to do so without good cause, the Regulator may refuse to consider the complaint.
 - (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 that the Regulator treat the complainant's identity as confidential;

- (d) a similar complaint is presently under investigation or has recently been resolved and accordingly no further investigation is justified; and
 - (e) the complaint is trivial, vexatious, misconceived or lacking in substance.
- (3) In determining, in terms of subdirective (1)(a), that a complaint is suitable for referral to mediation the Regulator shall consider, amongst other things, whether –
- (a) the complaint relates only to a matter between the complainant and the Authority; and
 - (b) there is any public interest in an investigation of or hearing regarding the complaint.
- (4) If the Regulator determines in terms of subdirective (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 and give the complainant reasons for its decision.
- (5) The Regulator shall, 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 the public interest does not require the continuation of the investigation.
- (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 subdirective (5) and of the reasons for that decision.

4. Mediation of a complaint

- (1) If both the complainant and the Authority notify the Regulator, within 15 days of the issue of the mediation notification in terms of directive 3(1)(a) that they consent to mediation of the

complaint, the Regulator shall appoint and pay for an independent mediator to facilitate such mediation.

- (2) The procedure for any mediation conducted in terms of subdirective (1) shall be determined by the mediator appointed by 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.
- (4) The settlement of a dispute by the parties and/or the issue of a finalisation notice shall not prevent the Regulator from continuing its own investigation into the complaint if the Regulator is of the view that a continued investigation is necessary.
- (5) A party to any mediation instituted in terms of subdirective (1) may, at any time before the conclusion of a settlement agreement in terms of subdirective (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 directive 5.
- (6) A complainant who consents to mediation in terms of subdirective (1) and who does not issue a Notice of Withdrawal from Mediation before the conclusion of the settlement agreement in terms of subdirective (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 subdirective (3).

5. Investigation of a complaint

- (1) In investigating a complaint the Regulator may –
 - (a) delegate, in accordance with section 45 of the Act, the power to conduct an investigation into the complaint;
 - (b) engage and utilise the services of experts or professional persons to assist in the performance of its investigative function;

- (c) request additional information in respect of the complaint from the Authority, the complainant or any other relevant party;
 - (d) request, from the Authority, the complainant or any other relevant party, 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; and/or
 - (e) interview members of the Authority, the complainant and other interested parties and any employees of these bodies.
- (2) If the Regulator determines in terms of directive 3(1)(b) that a complaint will be investigated it shall, within 15 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 15 days.
- (3) Subject to directive 16, the Regulator shall provide the complainant with a copy of the Authority's answer and request the complainant to respond to the answer within the period specified by the Regulator, which period shall not be less than 15 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.

6. Hearing into a complaint

- (1) Before directing that a hearing be held, the Regulator shall notify the Authority of its intention to so direct and ensure that the Authority has been provided with a copy of the complaint.
- (2) The Regulator may give notice of a hearing in a newspaper or in any other manner it deems fit if the Regulator is of the view that it would be in the public interest to do so.

- (3) A notice published in terms of subdirective (4) must –
- (a) be in at least two of the official languages and take 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 that the Regulator has determined to be confidential following a request from the Authority in terms of directive 17;
 - (c) state the venue of the hearing and the time and date on which the hearing will commence;
 - (d) invite any person who has a material interest in the hearing to make written submissions to the Regulator regarding the subject-matter of the hearing and determine the date for such submissions, which should be not less than 30 days after the date of publication of the notice;
 - (e) if the Regulator considers it appropriate, invite members of the public to attend the hearing; and
 - (f) invite any person who has a material interest in the hearing and wishes to participate in the hearing to make an application to the chairperson of the hearing panel in accordance with directive 14(2).
- (4) To ensure that the hearing is brought to the attention of the public, the Regulator may, in addition, publicise the information referred to in subdirective (3) 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.
- (5) 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.

- (6) 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 account of the Regulatory Principles of the Regulator.

7. Regulator to take decision in respect of the complaint

- (1) Subject to directive 3(5) the Regulator shall uphold or dismiss the complaint and make an appropriate order in accordance with section 54 of the Act.
- (2) The Regulator shall make 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 may, if it deems it necessary, publicise the complaint and decision 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 or any other method it deems appropriate.
- (4) The Regulator shall make a decision in terms of subdirective (1) as soon as reasonably possible after receipt of the complaint.

CHAPTER 2 - APPEALS AGAINST DECISIONS OF THE AUTHORITY

(Sections 30(3)(a)-(d) read with section 46 of the Act)

8. 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 that decision must lodge a Notice of Intention to Appeal with the Regulator within fifteen days after receiving that written 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 fifteen 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 ten 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) an affidavit setting out a 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, payable in cash or by way of a bank guaranteed cheque, prescribed for appeals in Schedule A hereto. In the event that the appellant is unable, as a result of indigency, to pay the prescribed fee, the appellant may apply to the Regulator to waive payment of the fee and the Regulator may, after considering that application, waive payment of the fee.
- (4) The Regulator shall serve a copy of the Notice of Intention to Appeal on the Authority.
- (5) Service of the Notice of Intention to Appeal does not suspend the operation of the decision appealed against unless a Court orders otherwise.
- (6) 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.
- (7) 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. 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, answering and replying affidavits, as well as for the consideration and hearing of the appeal. Having considered the request and the Authority's comments the Regulator may waive any time periods and procedures set out in

these directives and deal with the appeal as expeditiously as the Regulator deems appropriate.

9. Submission of an appeal affidavit

- (1) Within 30 days of the lodging of the Notice of Intention to Appeal the appellant must file with the Regulator and serve on the Authority an affidavit setting out the grounds of appeal and appending all relevant supporting documentation referred to in the Notice of Intention to Appeal or relied upon by the appellant and which is not in the possession of the Regulator and the Authority.
- (2) If the appellant fails to file the appeal affidavit before the expiry of the time period contemplated in subdirective (1) and fails to apply, before the expiry of the time period contemplated in subdirective (1), for condonation in terms of directive 19, or if the Regulator refuses such application for condonation the appeal shall lapse.

10. Answering and Replying affidavits

- (1) The Authority may submit to the Regulator an answering affidavit within 30 days from the date the appeal affidavit was served on it and must serve a copy of its answering affidavit on the appellant at the same time as filing it with the Regulator.
- (2) The Regulator may, on application by the Authority, condone the filing of an answering affidavit outside the time period contemplated in subdirective (1).
- (3) If the Authority introduces any new information in its answering affidavit that is not dealt with in the appeal affidavit, the appellant may, within 15 days of receipt of the answering affidavit, serve on the Authority and file with the Regulator a replying affidavit in response to such new information.

11. Processing of appeals

- (1) Receipt by the Regulator of a Notice of Intention to Appeal, an appeal affidavit, an answering affidavit or a replying affidavit, if any, shall be acknowledged in writing within ten days of receipt of the Notice or affidavit to the chosen address of the appellant.

- (2) Once the Regulator has received the answering affidavit and replying affidavit, if any, or the relevant time periods for the submission of such affidavits lapse, 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. Such a date for the hearing shall be at least thirty days after the notice issued by the Regulator unless the parties agree otherwise or the Regulator deems it appropriate.
- (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 shall take account of the Regulatory Principles of the Regulator.
- (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.

12. Decision on appeals

- (1) The Regulator shall after due consideration of all affidavits, documents, evidence and reports before it –
 - (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 subdirective (1) as soon as reasonably possible after the receipt of the Notice of Intention to Appeal.
- (4) The Regulator may, if it deems it necessary, publicise the appeal and decision 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 or any other method it deems appropriate.

CHAPTER 3 - HEARINGS OF THE REGULATOR**(Sections 30(2) and 30(3)(f), read with sections 49, 50 and 51 of the Act)****13. Composition of the hearing panel**

Subject to the exercise of the Regulator's powers of delegation in accordance with section 45 of the Act, the Regulator shall hear all complaints and appeals as the hearing panel.

14. Subpoena 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 subpoena 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 subpoena must specify the document or thing to be produced.
- (3) After the summons has been issued, it must be served by the sheriff at the instance of the party that has requested the subpoena.
- (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, the witness must in writing:
 - (a) Identify the document or thing; and
 - (b) state by way of affidavit why the witness claims that the document or thing is legally privileged.

- (6) If the Regulator decides on the strength of the documents presented in subdirective (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.

15. 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 Regulator at least twenty days before the scheduled date of the hearing informing the Regulator of that person's 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) The chairperson of the hearing panel shall decide whether to permit that person to participate in the hearing and shall notify that person, the Authority and the complainant or appellant of the decision at least ten days before the scheduled date of the hearing.

16. 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 the chairperson's discretion, exclude from, and/or limit access to, 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 the chairperson's opinion, not desirable;
 - (b) the chairperson of a hearing panel may exclude members of the public, or specified persons or categories of persons, from attending the hearing or portions of the hearing if the proper conduct of the hearing requires it or for any other reason that would be justifiable in civil proceedings in the High Court.

- (c) 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;
 - (d) 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; and
 - (e) the hearing shall be conducted as expeditiously as possible and with a minimum of legal formalities.
- (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 the complaint or appeal, as the case may be, to the hearing panel and to produce such witnesses, documents, books or items as assist in such presentation;
 - (b) 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 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;
 - (e) the hearing panel may put questions to any witnesses and examine any document, book or item presented by any parties in order to clarify any issue;
 - (f) 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, at the

chairperson's 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 the chairperson's 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;

- (g) any person authorised to participate in the hearing in terms of directive 15(3) shall indicate at the time of making an application in terms of directive 15(2) 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 subdirectives (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 subdirectives (b) and (c) above;
- (3) The chairperson of the hearing shall direct that the proceedings of the hearing be voice recorded. 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.
- (6) The Regulator, on the recommendation of 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))

17. 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 Authority shall make the requested information available to the Regulator during office hours and within ten working days of the request or such longer period as the Regulator may in writing allow.
- (3) The Authority shall clearly mark as confidential all information which it believes to be confidential information as defined in directive 25 (1).
- (4) The Regulator may use the information for any purposes pursuant to its functions in terms of the Act and these directives, but shall advise the Authority in writing before disclosing any of the information marked as confidential information to any Third Party.
- (5) Upon receiving notification in terms of subdirective (4), the Authority may claim that information shall not be disclosed by the Regulator as it is confidential information as defined in directive 25 (1) and must support its claim with –
- (a) a written statement motivating why the information should be recognised as confidential information; and
- (b) either:-
- (i) a written abstract of the information in a non confidential form; o

- (ii) an affidavit setting out the reasons why it is impossible to comply with subparagraph (i).
- (6) The Regulator shall determine whether the information satisfies the requirements of confidential information set out in directive 25 (1) and notify the Authority in writing of its determination.
- (7) The Regulator may, if it has determined that the information is not confidential, advise the Authority 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 Authority.

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

(Section 30(3)(f))

18. 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 16h30.
- (2) Any document which is required to be served on, lodged or filed with the Regulator may be
 - (a) delivered by hand to The Ports Regulator, 11th Floor, The Marine, 22 Dorothy Nyembe Street, Durban, Republic of South Africa; or
 - (b) transmitted by telefax on 27 31 365 7857;
 - (c) mailed by registered post to The Ports Regulator, Private Bag X54322, Durban, 4000; or
 - (d) submitted electronically by way of the website of the Regulator at www.portsregulator.org.za or emailed to tribunaladmin@portsregulator.org.

- (3) Any document which is required by these directives to be served on the Authority shall be --
- (a) delivered by hand to The Authority, Carlton Centre, 150 Commissioner Street Johannesburg, Republic of South Africa, marked for the attention of :”The Transnet Group Chief Executive”;
 - (b) transmitted by telefax on 27 11 308 2312;
 - (c) mailed by registered post to the authority Private Bag 72501,Parkview, Johannesburg, 2122; or
 - (d) delivered by hand to the Harbour Master at the relevant port closest to the physical address of the appellant or complainant.
- (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 a document is delivered outside of the office hours of the Regulator, that document will be deemed to have been delivered at 09h30 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
 - (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 18 is an originating complaint or Notice of Appeal, it shall be accompanied by the fee prescribed therefore in Schedule A hereto or proof of payment thereof, failing which the Regulator shall not consider same.

19. 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.

20. Register of complaints and appeals

- (1) The Regulator shall maintain separate registers for complaints and appeals 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
 - (iv) 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 complaints register, at the offices of the Regulator during office hours.

**CHAPTER 6 - THE FILING OF PRICES CHARGED BY THE PROVIDER OF ANY PORT
SERVICE OTHER THAN THE AUTHORITY**

(Section 30(3)(h))

21. 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.
 - (a) The Regulator shall keep all price lists disclosed in terms of this directive and shall, subject to directive 25, make them available to any person who requests them.

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

(Section 30(2)(d) read with section 72 of the Act)

22. Approval and amendment of tariffs

- (1) The Authority shall, within 30 days of the directives coming into effect and, thereafter 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 tariff 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 subdirectives (1) or (2) above shall contain sufficient information for the Regulator to consider the submission; in particular the Authority shall set out –
- (a) the manner in which the tariffs have been calculated, and the model used by the Authority for determining and calculating the tariffs;
 - (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;
 - (i) the manner in which the tariffs will affect the cost of doing business in the ports;
 - (ii) the proposed profit margin or rate of return, together with a motivation to show why this margin or return is commensurate with risk; and
 - (iii) the manner in which the factors set out in directive 23 apply to the proposed tariffs.
- (4) The Regulator may call on the Authority to provide any additional information which the Regulator requires to consider the submission made in terms of subdirective 1 or 2 or to approve the proposed tariffs.
- (5) The Authority may in a submission made in terms of subdirective (1) or (2), identify information which the Authority believes is confidential information. Any such submission shall be made and dealt with in the manner set out in directive 25.
- (6) 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.
- (7) If the proposed tariffs will or are likely to materially and adversely affect the rights of any person, the Regulator must publish notice of the proposed tariffs in a newspaper circulating

in the area affected by the proposed tariffs or in some other appropriate manner inviting, in the Regulator's discretion, written or oral submissions regarding the proposed tariffs.

- (8) A notice published in terms of subdirective (7) 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 that the particulars of the proposed tariffs may be obtained on the Authority's website and from the Authority's offices in each port.
 - (c) invite relevant members of the public to submit written objections to and comments on the proposed tariffs 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 request an opportunity to make oral submissions before the Regulator at the time and date and in the manner set out in the notice; and
 - (e) invite members of the public to attend all meetings at which the oral submissions referred to in subdirective (d) are made.
- (9) To ensure that the proposed tariffs are brought to the attention of the public, the Regulator may, in addition, publicise the information referred to in subdirective (8) 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.
- (10) The Regulator shall provide the Authority with a copy of all written submissions received following a notice issued in terms of subdirective (8) and shall provide the Authority with an opportunity to respond in writing to all such submissions.
- (11) 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 tariffs.

- (12) 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 tariffs.
- (13) The Regulator shall, when assessing the tariffs, limit the increases to the existing revenue weighted tariffs to $CPIX \text{ minus } X$. CPIX is the prevailing Consumer Price Index excluding mortgage cost inflation. X is the efficiency factor determined by the Regulator after consulting the Authority, other Government stakeholders and those port users that the Regulator deems necessary.
- (14) The Regulator shall perform a tariff level rebasing every five years which shall –
- (a) set the baseline tariff structure that shall be used in assessing the Authority's subsequent applications for approval of the tariffs;
 - (b) be informed by the port system capacity requirements forecasts, recoveries on existing tariffs, tariffs for comparable services in ports in other countries, the valuation of the Authority's asset base and any other factors the Regulator deems necessary; and
 - (c) be performed and released for the first time at least two months before the third tariff application after the commencement of these directives.
- (15) 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 tariffs and any other party that made written or oral submissions to it.
- (16) The Regulator shall take a decision in terms of subdirectives (1) and (2) within four months of the receipt of the submission.

23. Tariff requirements

- (1) In considering the proposed tariffs in terms of directive 22, the Regulator must have regard to whether the proposed tariffs reflect and balance the following considerations:-

- (a) A systematic tariff methodology that is applicable on a consistent and comparable basis;
 - (b) Fairness;
 - (c) The avoidance of discrimination save where discrimination is in the public interest;
 - (d) Simplicity and transparency;
 - (e) Predictability and stability;
 - (f) The avoidance of cross subsidisations save where cross subsidisation is in the public interest; and
 - (g) The promotion of access to ports and efficient and effective management and operation in 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.

24. Application of the tariffs

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 –

- (a) the party to the relevant agreement for such variation of the tariff;

- (b) each tariff in respect of which a variation has been agreed;
- (c) the nature of the agreed variation; and
- (d) the duration of the agreement.

CHAPTER 8 – CONFIDENTIAL INFORMATION SUBMITTED TO THE REGULATOR
(Section 30(3))

25. 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
 - (iii) 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 subdirective (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 –
 - (i) a written abstract of the information in a non-confidential form; or
 - (ii) an affidavit 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) The Regulator shall advise the party claiming that the information is confidential in writing before disclosing any of the information marked as confidential information and provided in terms of subdirective (4) to any third party or disclosing it for the purposes of any investigation, appeal, hearing or other public process.
- (6) The Regulator may, if it has determined that information is not confidential, advise the person claiming that it is confidential that the information will be available for public disclosure twenty days after date of receipt by that person of the written confirmation of the Regulator's determination.
- (7) The Regulator may, when making any decision, take confidential information into account in making its decision.
- (8) If the Regulator's reasons for the decision would reveal any confidential information, the Regulator must provide a copy of the proposed reasons to the party that it claimed the information was confidential and shall not publish or disclose such reasons to a third party until twenty days have passed from the date of receipt of the proposed reasons by the party that had claimed the information was confidential.
- (9) A party may apply to the appropriate High Court, subject to that Court's rules, within twenty days after receiving the notification that the information will be available for public disclosure or after receiving a copy of the proposed reasons, for an appropriate order to protect the confidentiality of the information.

- (10) If a party applies to the High Court in terms of subdirective (8) the Regulator must not make the information available for public disclosure or publish the proposed reasons as the case may be until such application is finalised.

26. CHAPTER 9 – General

Commencement of these directives

- (1) These directives shall come into effect on the date of their promulgation in the *Government Gazette*.

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.

FORM 1: NOTICE OF COMPLAINT**NOTICE OF COMPLAINT TO THE PORTS REGULATOR AGAINST THE AUTHORITY**

[Chapter 2 of the Directives]

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 complaint is lodged in the space provided below. The matter complained of must have arisen within 3 months of the date on which this complaint is lodged.

D. Nature of the relief sought

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

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:

H. Request for waiver of complaint fee

If you are of the view that the Regulator should waive the requirement for payment of the prescribed fee on the grounds of indigency as set out in directive 2(5)(d), the grounds for claiming indigency must be set out below. In addition you must provide copies of relevant documents, such as a statement of assets and liabilities and bank accounts, to support the request for waiver.

Do you want to apply for waiver of the prescribed fee on the grounds of indigency?

If yes, please provide reasons. Supporting documents must be signed and attached:

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).

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).

**FORM 2: NOTICE OF INTENTION TO APPEAL**

**NOTICE OF INTENTION TO APPEAL TO THE PORTS 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 affidavit 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: _____

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:

E. Request for waiver of appeal fee

If you are of the view that the Regulator should waive the requirement for payment of the prescribed fee on the grounds of indigency as set out in directive 8(3)(b)(iii), the grounds for claiming indigency must be set out below. In addition you must provide copies of relevant documents, such as a statement of assets and liabilities and bank accounts, to support the request for waiver.

Do you want to apply for waiver of the prescribed fee on the grounds of indigency?

If yes, please provide reasons. Supporting documents must be signed and attached:

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: _____

DATE

**Chairperson of Ports
Regulator**

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



FORM 3: SUBPOENA OF WITNESSES AND PRODUCTION OF EVIDENCE

To: _____
 (Name of Subpoenaed Person)

 (Address of Subpoenaed Person)

A Hearing Panel of the Ports Regulator has been appointed to hear a dispute in terms of Directive 13 issued in terms of section 30 (3) of the National Ports Act 12 of 2005 between

 and

 (Names of Parties to dispute)

You are required in terms of Directive 14 issued in terms of section 30 (3) of the National Ports Act 2005 to attend the hearing at

 (Address where hearing is being held)

on _____ at _____
 (Date of Hearing) (Time of Hearing)

Unless you claim in writing to the Regulator that the document or thing is legally privileged, you must, as soon as possible, hand over to the Regulator the documents and things listed below. If you claim any document or thing is legally privileged you must identify the document or thing and state by way of affidavit or affirmation why you claim the document or thing is legally privileged.

(List documents and things)

(Signed by Ports Regulator)

(Date)

(Place)