



**ECONOMIC REGULATION OF TRANSPORT (ERT) BILL
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transport

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Transport
REPUBLIC OF SOUTH AFRICA

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1. What is Economic Regulation?



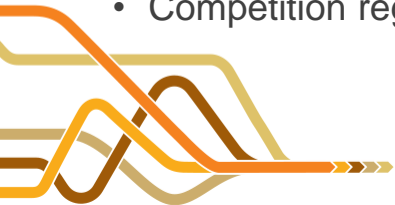
Economic Regulation

Economic regulation refers to controls within the transport sector to ensure a safe and reliable transport system at a fair tariff (price) and agreed minimum service standard made available throughout the country.

Objectives:

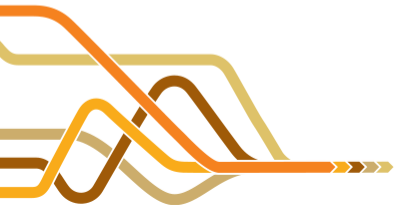
To ensure that services provided to consumers are effective, efficient, sustainable and meet consumer's needs through:

- Consumer protection;
- Service quality regulation;
- Price regulation; and
- Competition regulation

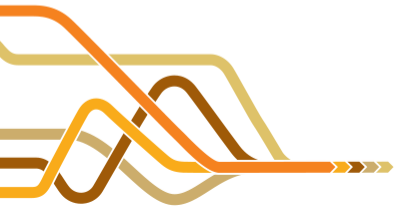


Significance & Impact of economic regulation in the transport sector

- *Better pricing, improved levels for significant pieces of transport infrastructure and services*
- *An independent appeals body to deal with problems on that infrastructure or service provided– No longer a pure political route*
- *A specialist body to help design and oversee concession agreements*
- *The Regulator may engage with the transport sector and provincial and municipal authorities as follows:*
 - Provision of technical assistance or expertise
 - Co-operative activities to detect and suppress prohibited conduct or offenses



2. TER Rationale



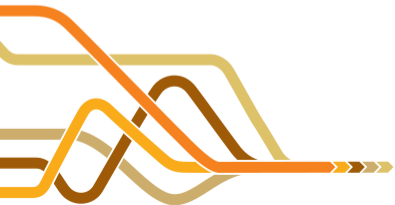
Stronger oversight is required, particularly if competition is desired

- Oversight currently provided by DPE, on an arms-length basis via corporatized model
- Transnet Freight Rail determines access conditions and prices – no independent regulation
- Rail network exhibits natural monopoly characteristics, but it would be possible to introduce competition in rail services
- However, facilitating service competition is not possible as a policy option in the absence of regulated access conditions
- TFR is unlikely to be incentivized to offer fair access conditions (e.g. prices, scheduling, etc.) to competitors
- **Independent regulation will shed light on sector pricing, performance and potential**



Existing regulation needs improvement

- Substantive regulation already in position, much of which is focused on safety
- **Economic regulation:**
 - Bilateral agreements, negotiated at a political level
 - Licenses issued by the International Air Services Council
 - Airports and navigation services via the Regulating Committee
- **Need for improvement:**
 - Regulating Committee is a part-time structure that lacks capacity and continuity
 - No appeals functionality: e.g. 2010 ACSA dispute and the Competition Commission accused **SA Airlink** of engaging in **predatory** pricing (2023 case)
 - Disagreement between airline operators and airports over the impact of the current pricing methodology



Existing regulation inadequate

- Independent Ports Regulator oversees TNPA only
- TNPA is the regulator of TPT and is in a vertical relationship with TPT
 - Multiple points of contact facilitate cooperation between TNPA and TPT
 - Ability to reap monopoly profits at TNPA impinged on by regulation
 - Creates strong incentives to exclude competition (access) , increase prices at port terminals
 - Prima facie case for regulation: would not exist if NPA was separated from Transnet
- Lack of independent funding and limited scope of Ports Regulator affects its ability to fully implement regulatory mandate



Light touch but independent oversight needed

- Existing road regulations mostly focused on safety, and accessibility (CBRTA, NPTR, PREs, etc.)
- Implementation of user pay principle to pay for infrastructure investments is increasing the size of the toll network
- No independent regulation of the toll system
- SANRAL is tasked both with implementing and overseeing toll systems
 - Potential conflict of interest
 - Transparency of the system is mixed, which has affected public perception
- **Role for independent oversight of SANRAL toll systems, and possibly some elements of new concession contracts going forward**



The importance TER

Introducing economic regulation via TER is the best policy option, most likely to improve sector outcomes by:

Improve

improving the existing economic regulatory framework by:

- Strengthening the independence of existing regulators
- Developing rigorous and consistent methodologies and procedures
- Creating sufficient and dedicated regulatory expertise

Expand

expanding the existing economic regulatory framework by:

- Addressing potential conflicts of interest in the implementation and oversight of transport infrastructure
- Introducing regulatory oversight across the rail sector
- Deepening oversight across key aspects of the transport value chain

This can be achieved through the consolidation, rationalisation and redesign of economic regulation in the transport sector into a single multi-modal regulator

3. Economic Regulation of Transport (ERT) BILL



Narrative of the ERT Bill

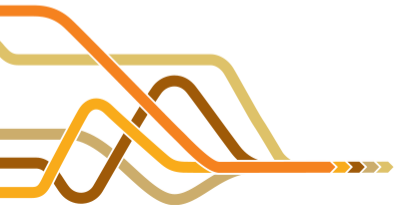
The key components of the Bill are divided into *Governance and Substance* matters.

Governance matters refer to:

- (1) the institutional and legal design of the regulatory system and the framework within which decisions are made;
- (2) the establishment of regulatory independence;
- (3) the appointment of the regulator; and
- (4) the handling of disputes and appeals.

Substance matters relate to:

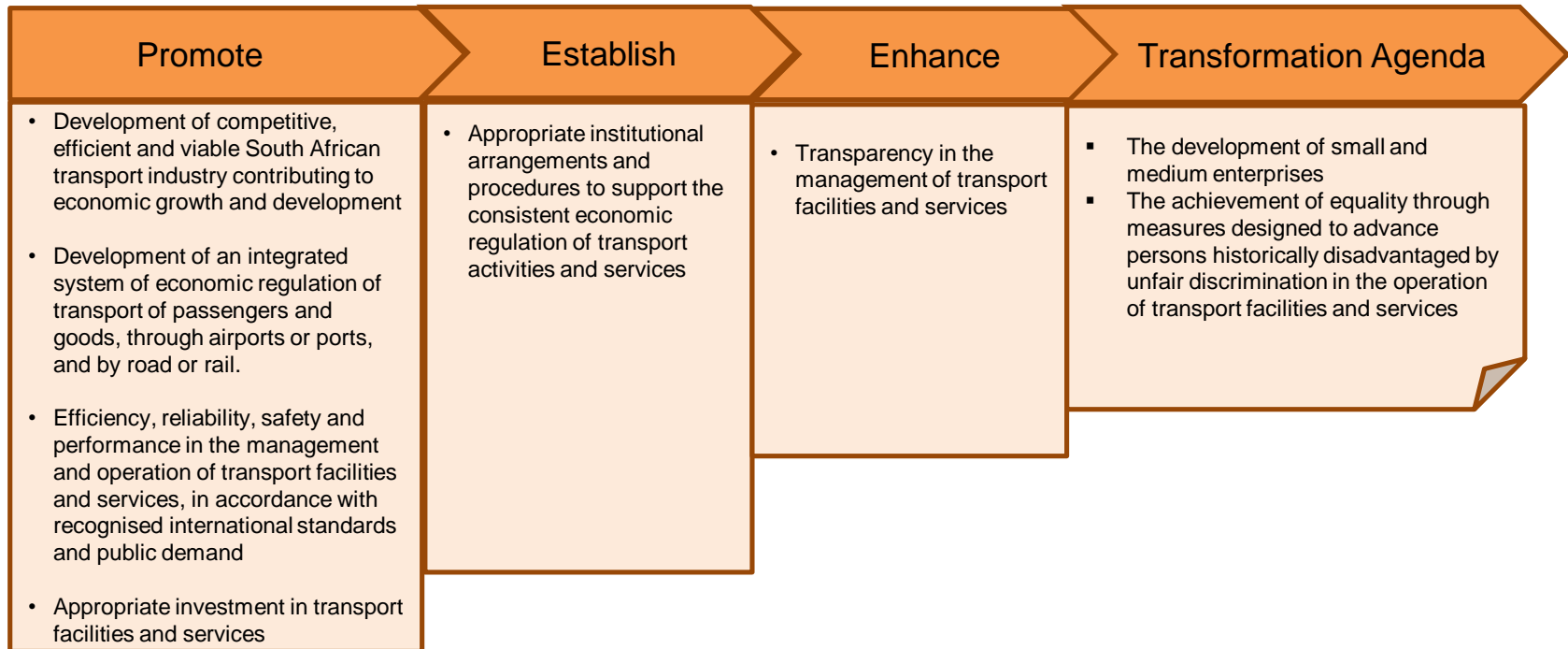
- (1) content of regulation;
- (2) how actual decisions, whether explicit or implicit, are made by the specified regulatory entity or other entities within government, along with the rationale for decisions;
- (3) choice of pricing methodology and scope; and
- (4) licensing requirements and licensee obligations, etc.



Objectives of the Bill

The Bill aims to address shortcomings through:

- Consolidation of the economic regulation (ER) of transport within a single framework;
- Make consequential amendments to related Acts.
- Establishment of the TER and TEC that aims to:

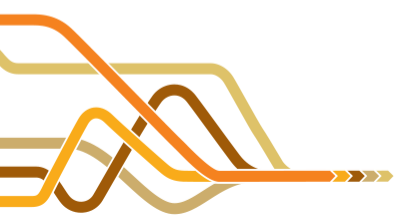
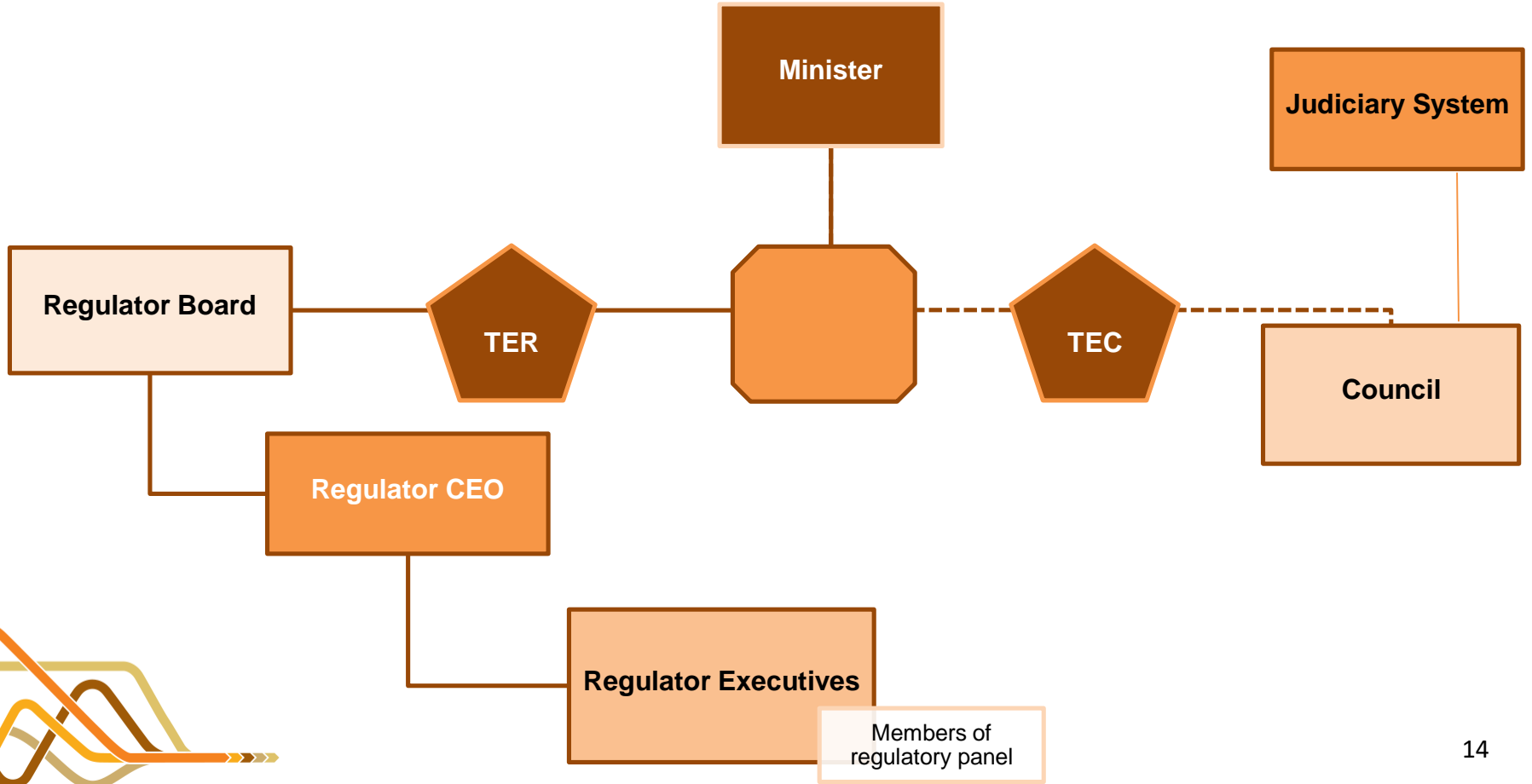


The key principles.

- The Regulator should be an independent organ of state
- There must be a mechanism to challenge decisions by the Regulator
 - For reasons of specialized economic analysis, it is best that the courts should **not** be the first forum for review of the Regulator
 - The Review entity must be separate from and independent of the Regulator
- The “board governance” model should be adopted, separate from the technical and administrative expertise of the CEO and staff of the regulator
- The Board cannot be the “independent review” tribunal for the Regulator’s decisions



Governance structure



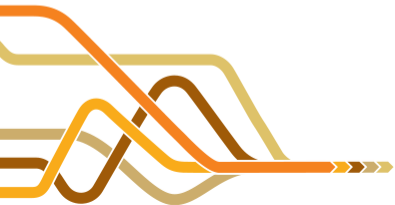
Roles and Responsibilities (1)

The role of the Minister

- Legislation designed to foster political independence
- Minister appoints (and removes) members of the Board of the Regulator and the Council
- May give a written direction to the Regulator to investigate any matter
- In consultation with the Minister of Finance, determine fee charged by the Regulator

The role of the Board

- Guides strategic development, ensures effective use of resources, ensures compliance with legal and financial reporting requirements
- Appoint and oversee the performance of the CEO and Deputies
- **Must not interfere in the procedures or decisions of the Executive Panel in the performance of its regulatory functions**



Roles and Responsibilities (2)

The role of the Regulator

- Exercise economic regulation in line with national policy
- Promote competitively equitable access to transport facilities and services
- Determine prices and service levels for transport facilities and services
- Monitor and enforce compliance with the Act, & investigate complaints

The role of the Council

An independent tribunal with some of the powers of a court; but does not have the status of a court

- Considers and determines reviews and appeals of Regulator decisions
- Secretarial support is provided initially by the Department of Transport, but the Council can establish its own administration should this be required



4. Transport Economic Regulator



Mandate of TER

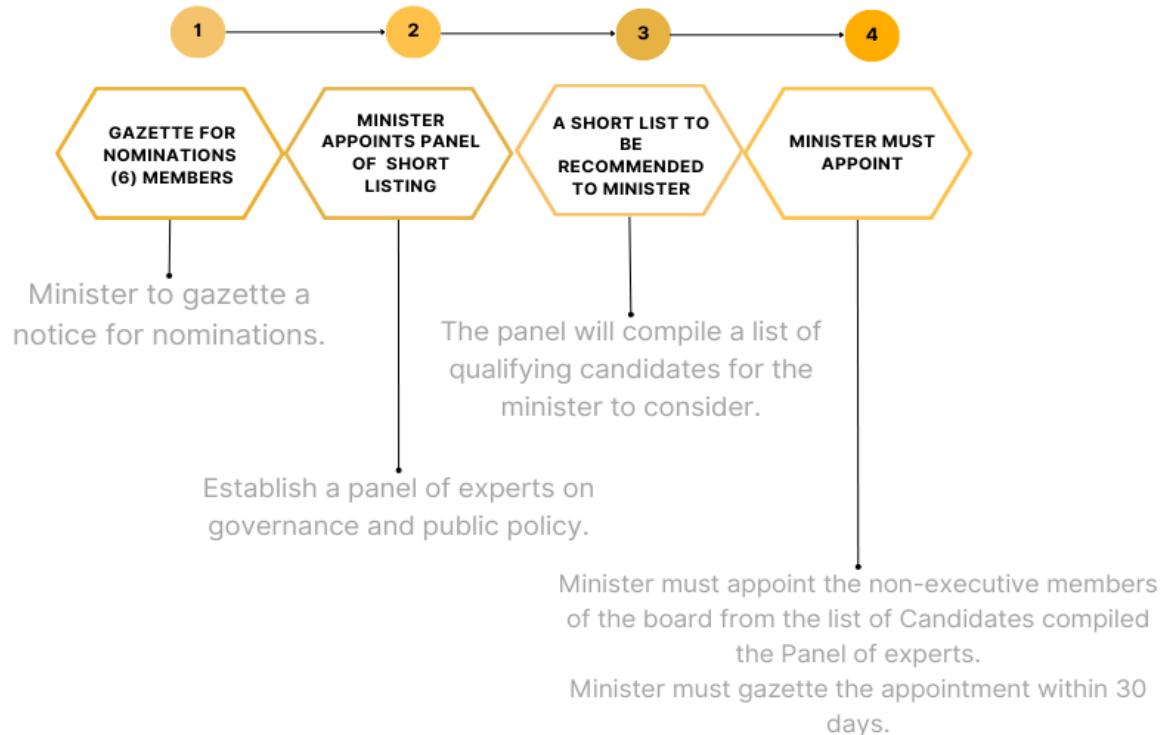
Functions of Regulator in accordance with Clause 38

“The Regulator must carry out the functions and exercise the powers assigned to it by or in terms of this Act or any other national legislation and, in particular, must–

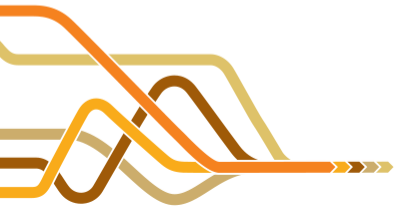
- (a) exercise economic regulation of transport facilities and services in line with national strategic objectives;
- (b) regulate the provision of adequate and efficient transport facilities and services;
- (c) promote efficiency in transport facilities and services by facilitating competition, where possible, and implementing regulations;
- (d) **Promote equitable access to transport facilities and services;**
- (e) promote appropriate investment in transport facilities and services;
- (f) **Research market structures and service delivery to determine whether or not particular entities, markets, facilities or services within the transport sector are functioning competitively;**
- (g) conduct market inquiries in accordance with Section 43(2)(b);
- (h) **Determine price controls for transport facilities and services in accordance with Part A of Chapter 3 and, for that purpose, may determine methods of price regulation as appropriate for the economic circumstances of regulated entities;**
- (i) **Monitor and enforce compliance with this Act, and with any service levels and other conditions of price controls; and**
- (j) **Investigate complaints contemplated in Section 15, and initiate investigations in terms of Section 17(2).”**



Appointment of Transport Economic Regulator Board



5. Transport Economic Council



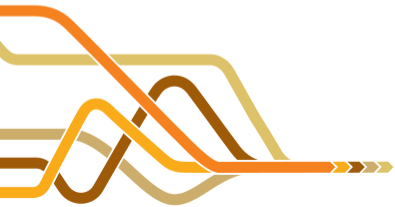
Mandate of TEC

Functions of Council in accordance to Clause 48

“The key function of the Council is to improve the quality of the decisions made by the Regulator through the independent review thereof. In terms of the Bill, the specific functions of the TEC are to:

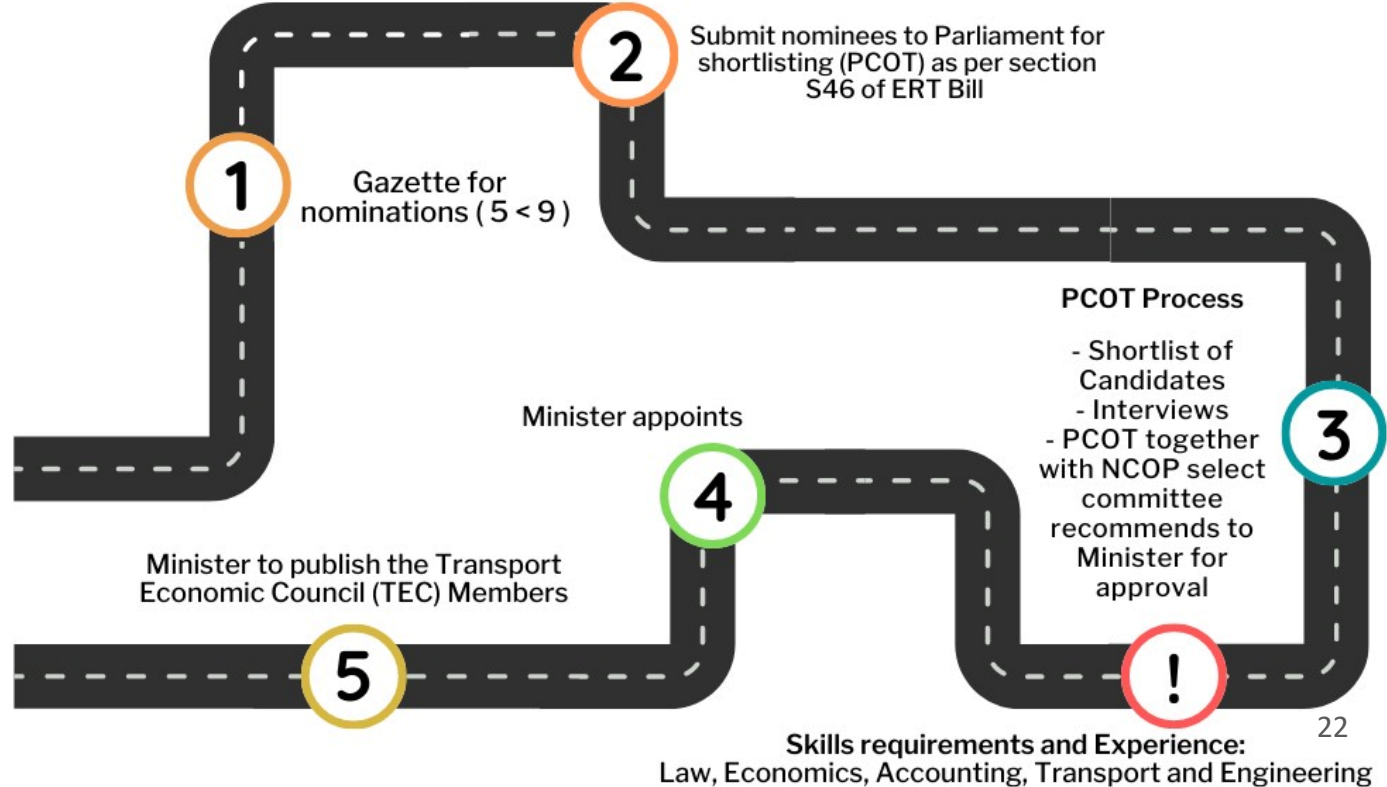
- Consider and determine referrals of complaints against regulated entities, in terms of section 16;
- Consider and determine referrals of the consent order in terms of section 19;
- Consider and determine applications for review or appeal of the decisions of the Regulator; and
- Conduct public hearings and publish its decisions.

To be effective, it is recommended that interactions between the Regulator and the Council be minimised and that the Council not be allowed to interfere in the day-to-day operations of the Regulator.”



ESTABLISHMENT OF TRANSPORT ECONOMIC COUNCIL

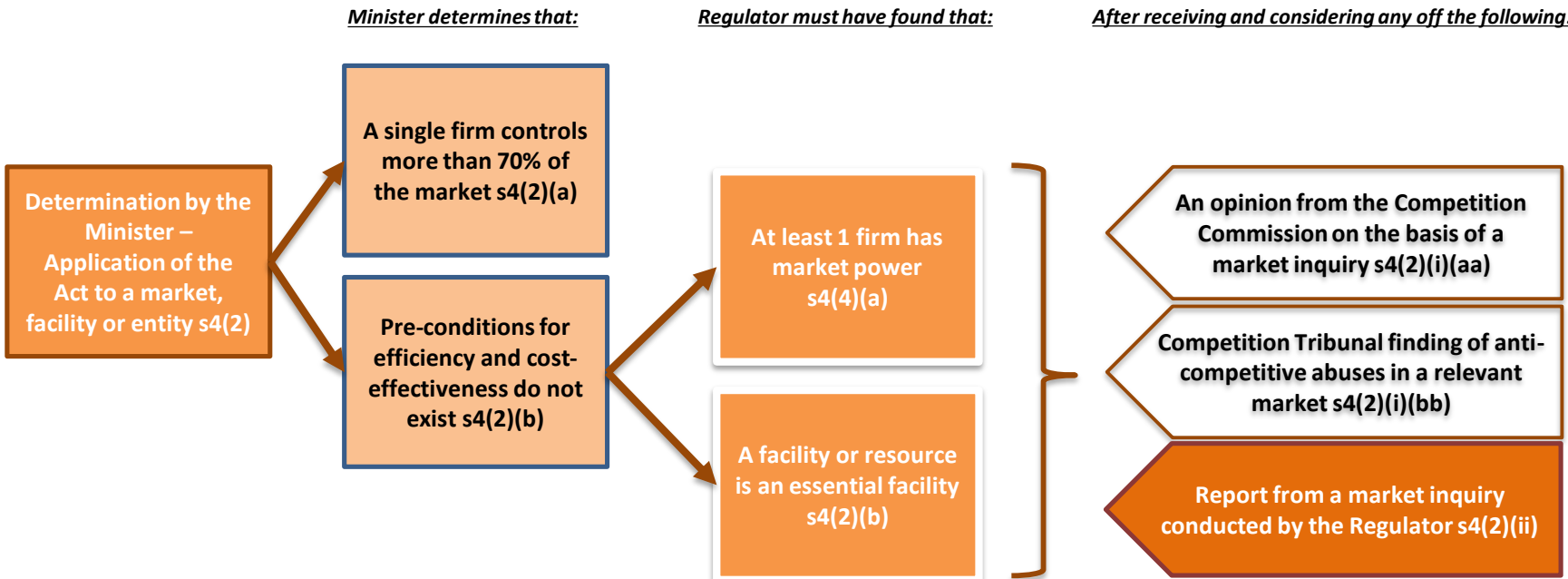
The Process only commences once the Act is promulgated



6. Application of the Act



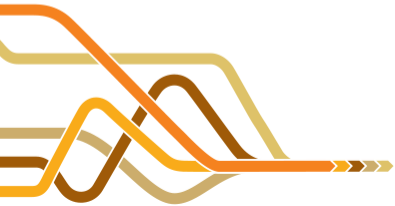
Decision process for application of the Act to transport sectors not currently regulated



Four important concepts emerge

- 1 The “market”
- 2 Market Power
- 3 Essential facility
- 4 Market Inquiry

7. Consideration of Access Approval



Consideration Of Access Approval By Regulator

In determining whether to grant access approval

- The Regulator must have regard to the following—
 - (a) whether there is available capacity on the infrastructure or facility;
 - (b) whether the access applicant is able to meet financial and other technical requirements necessary to successfully operate the infrastructure; and
 - (c) whether the applicant has received other regulatory approvals that may be required by or in terms of any law or regulations, or is likely to receive such approvals before the finalisation of its application.

Decision on access approval

- The Regulator must grant access approval, if all the requirements set out in determining whether to grant access approval are met.
- The Regulator may grant access approval, even if the requirements of determining whether to grant access approval are not met: Provided that the access seeker has given a written undertaking to the Regulator, to fund the required investment in infrastructure.
- Any party that is aggrieved by a decision of the Regulator in terms of this section, may appeal to the Council against a decision or apply to the Council for a review of the decision

Cession, transfer or assignment of access rights

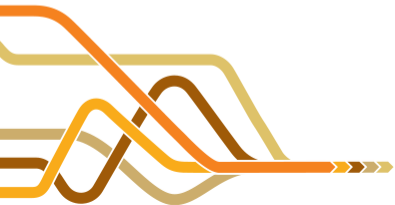
- An entity that has been granted access approval by the regulator, may cede or transfer any or all of its access rights to a third party, on condition that—
 - (a) the entity must first notify the infrastructure owner and the Regulator of its intention to cede or transfer access rights;
 - (b) the entity ensures that all its obligations remain fulfilled; and
 - (c) third parties may not cede or transfer such access rights to any operator.

8. Price Regulation

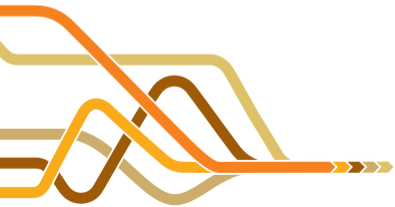


Determination Of Price Control

- Regulated entities must prepare and submit a request for a **price control** to the regulator, for the facilities & services they offer
- The **price control** may comprise a schedule of tariff, charges, fees, tolls, a revenue cap, a limit on the rate of return or a combination of the above methods.
- Price requests must be in a prescribed form and include associated **service standards**
- The regulator may **determine** or adjust the price control as requested by the regulated entity, with or without conditions
- Factors used to determine the price control include: operating efficiency; need for investment and security of supply in the market; opportunity cost of capital; likely effect on the economy, employment, consumers and SMEs; etc



9. Complaints, reviews and appeals



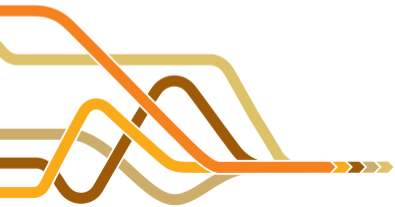
Complaints, reviews and appeals

Complaints against regulated entities

- Any person may file a complaint with the Regulator against a regulated entity
- The regulator must consider or investigate every complaint
- If prohibited conduct is found, the Regulator can issue a consent order, compliance notice or pricing structure reduction

Review and **Appeal** of regulator's decision

- Any person adversely affected by a decision made by the Regulator may appeal that decision to the Council or apply for a review
- When considering an appeal or review of a pricing structure, the Council may either affirm the pricing structure or refer it back to the Regulator for re-consideration.
- When considering a compliance notice, or pricing structure reduction notice, the Council may confirm, modify or cancel the notice.



10. Consequential Amendments



Incorporation of other Regulators

“Clause 4(11)

- (1) The Minister may, in consultation with the Regulator, from time-to-time, by notice in the *Gazette*, declare that any other regulators, in no particular order, are consolidated into the Regulator—
- (a) including the following regulators, but not limited to:
- (i) Cross-Border Road Transport Agency;
 - (ii) National Public Transport Regulator;
 - (iii) Air Service Licensing Council;
 - (iv) International Air Services Council; and
 - (v) any other regulator.
- (b) if the Minister has determined that that one or more of the regulators referred to in subsection (1) must be incorporated, the Department must produce a report from conducting a review of their performance and capabilities, including the initiation of the legislative reform required to facilitate the incorporation of these regulators within three years from the effective date and from time-to time, thereafter.



Consequential Amendments

Consequential Amendments and transitional arrangements: The Economic Regulation of Transport Act will come into operation on a date fixed by the President by proclamation in the Gazette

National Ports Act

All functions of the Ports Regulator South Africa will be transferred to the Regulator.

Airports Company Act

The function of the Regulating Committee is assumed by the Regulator.

Air Traffic and Navigation Services Company Act

The function of the Regulating Committee is assumed by the Regulator

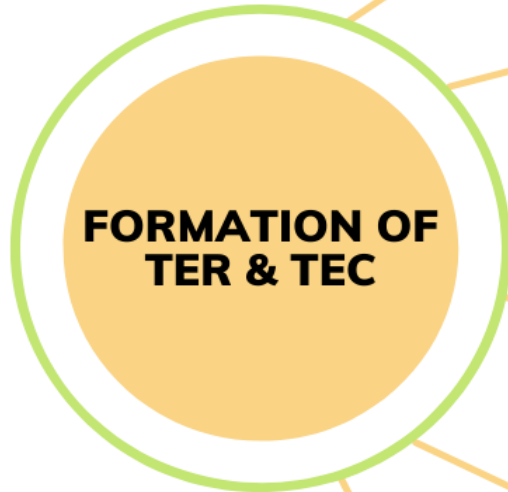
National Land Transport Act

The Regulator will assume the function of overseeing the fares charged for public transport functions and the precondition of determining the fees in s28 of the affected act is also amended.

South African National Roads Agency Limited and National Roads Act

Transferring the Minister's powers of determining the toll fees to the Regulator as prescribed in s27 in conjunction with s28 of the affected act

POST ENACTMENT OF THE ERT BILL



1

MARITIME

Ports Regulator of South Africa - to be incorporated into TER in its entirety.

2

AVIATION

Regulating Committee - Its Function will be performed by the TER at inception, which will have full-time dedicated capacity.

Air Services Licensing Council - Its Function will be performed by the TER at inception, which will have full-time dedicated capacity.

International Air Services Council - Its Function will be performed by the TER at inception, which will have full-time dedicated capacity.

3

ROAD

NPTR - to be absorbed into TER in accordance to Clause 4 (11) of the Bill.

CBRTA - Personnel performing the function of determining the permit fees.

Toll Fees - determined by the Minister, however this will be assumed by TER.

4

RAIL

IRERC - to provide capacity that will be transferred to TER.

5

DOT

All DOT personnel performing Secretariat functions for Regulatory Bodies.

THANK YOU

