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RULE OF LAW PROJECT
FREE MARKET FOUNDATION

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SUBMISSION TO THE COMMITTEE ON TRANSPORT ON THE ECONOMIC REGULATION OF TRANSPORT BILL, 2020

Attn: Valerie Carelse, vcarelse@parliament.gov.za

Johannesburg PO Box 4056 | Cramerview 2060 | **Tel** 011 884 0270 | **Email** martinvanstaden@fmfsa.org
NPO No 020-056-NPO | PBO & Section 18A(1)(a) No 930-017-343

www.RuleofLaw.org.za

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Executive summary

There are three broad issues underlying the proposed Economic Regulation of Transport Bill, 2020, that the Free Market Foundation regards as problematic.

The first is that the Bill unnecessarily and unjustifiably intrudes on the private sphere, by expanding the extent and potential scope of government interference in the transport sector. The second is that the Bill, like many other pieces of legislation enacted by Parliament, vests executive officials, primarily the Minister of Transport as well as the proposed Regulator, with discretionary powers that are not restrained by any guiding criteria on how the they must exercise those powers. Thirdly, the Bill is clearly aimed at centralising governmental power away from civil society and away from independent institutions, in the hands of the Department of Transport and its minister.

It is an imperative under the Rule of Law, which is enshrined in section 1(c) of the Constitution, that Parliament refrains from assigning unrestrained discretionary powers to the executive in the legislation it enacts. Yet the Bill is riddled with provisions empowering the Minister and the Regulator to do certain things, appoint certain functionaries, and direct certain people to do things, all based on their own whims, without any of these decisions being restrained by legal principles or criteria. Certain vague provisions in the Bill, because of their lack of clarity, also lend themselves to being applied in any way the Minister and Regulator may see fit. In other words, the quality of legislative drafting as regards this Bill leaves much to be desired.

The Bill is fundamentally at odds with economic reality and with the legal-constitutional paradigm in South Africa. Price controls, which are the main feature of the Bill, are detrimental to a healthy economy and will at all times lead to distortions of market forces and incentives. The Free Market Foundation enjoins government to abandon the Bill and to instead remove regulations within the transportation industry so as to encourage and incentivise free enterprise and economic growth.

Contributors:

Martin van Staden
Head of Legal (Policy and Research)

Jacques Jonker
Economic and Legal Analyst

Free Market Foundation

Free Market Foundation and Rule of Law Project

The Free Market Foundation (FMF)[1] is an independent public benefit organisation founded in 1975 to promote and foster an open society, the Rule of Law, personal liberty, and economic and press freedom as fundamental components of its advocacy of human rights and democracy based on classical liberal principles. It is financed by membership subscriptions, donations, and sponsorships.

Most of the work of the FMF is devoted to promoting economic freedom as the empirically best policy for bringing about economic growth, wealth creation, employment, poverty reduction, and greater human welfare.

The FMF's Rule of Law Project[2] is dedicated to promoting a climate of appreciation throughout South Africa, among the public and government, for the Rule of Law; continually improving the quality of South African law; identifying problematic provisions in existing and proposed laws, and, where feasible, advocating rectification.

1 www.freemarketfoundation.com
2 www.ruleoflaw.org.za

1. Introduction

The Constitution of the Republic of South Africa, 1996,[3] particularly by way of the Bill of Rights, secures for all South Africans a sphere of freedom in which unwanted third parties, particularly government, may not intrude. We may express ourselves in certain ways without interference, we may own and keep property without interference, we may choose our own occupations, religions, have our own opinions and beliefs, and may decide how we live harmoniously with our fellows. These liberties may be limited, by application of section 36(1) of the Constitution, but the justification for such limitation is strict and methodological.

The proposed Economic Regulation of Transport Bill, 2020, represents a grave infringement on South Africans' guaranteed sphere of freedom, and no cogent justification is made for such an infringement either in the Bill itself or in its accompanying socio-economic impact assessment. The right to freedom of trade, occupation and profession, contained in section 22, is unjustifiably limited by the Bill.

Whilst section 22 states that the practice of a trade, occupation, or profession may be regulated by law, the extent of regulation proposed by the Bill places an unjust limitation on this right because it does not conform to the fundamental imperatives of the Rule of Law.

The Bill seeks *inter alia* to "consolidate the economic regulation of transport within a single framework and policy". The FMF is concerned that this Bill serves no other purpose than to add extra layers of bureaucracy and red tape to the transportation industry, during a time when South Africa is experiencing near-zero as well as negative economic growth. Section 3(1)(a) of the Bill states that the Bill seeks to "promote the development of a competitive, efficient and viable South African transport industry contributing to economic growth and development". While this goal is laudable, the provisions in the Bill directly contradict it, by creating a new regime of price fixing and of red tape. Instead of more regulations, it would be more appropriate for government to repeal existing regulations so as to allow new entrants to the market to do so free from compliance with onerous legal requirements.

As a result, the FMF proposes that the Bill be abandoned in its entirety. If that is not possible, any mention or reference to price control must be excised from the Bill. Lastly, the deficiencies in the legality of the Bill (mostly relating to the Rule of Law) must as an imperative, not as a preference, be removed.

2. Economic Regulation of Transport Bill – Flaws and concerns

Much of what is said hereunder relies on the background and theory enunciated under the headings that follow from heading 3 onward. We recommend that the reader familiarise themselves with that background and theory first, although that would not be necessary for readers who already have a basic conceptual understanding of constitutionalism and the Rule of Law.

[3] Hereinafter "the Constitution".

2.1 Clause 4: Application of Act as determined by ministerial decree

The prerequisite circumstances specified in clause 4(2)(a)-(b) that should be present in a market are problematic for two reasons: arbitrariness and the *carte blanche* power given to the Minister to impose this Act.

Clause 4(2)(a) specifies that a single operator must control more than 70% of the market concerned before the Minister may declare the Act applicable to that market. However, the 70% threshold is inherently arbitrary. There is no reason why it should be 70% and not simply any other value such as, say, 1% or 99%.

Clause 4(2)(b) specifies that the preconditions for efficiency and cost-effectiveness do not exist in the market concerned. Yet, the Act does not define what is type of market conditions constitute efficient and cost-effective markets, never mind any metrics by which to measure this.

A second problem with clause 4(2) lies in its sub-criteria as set out in clause 4(4)(a)-(b).

Clause 4(4)(a) states that the Regulator established in terms of clause 29 of the Act must have found that at least one firm operating in the market in question has "market power". In clause 1 of the Act, "market power" is defined to mean the power of an entity to control prices, exclude competition, or behave to an appreciable extent independently of its competitors, customers, or suppliers. The three aspects will be dealt with separately.

The aspect of price control is extremely problematic because the only situation in which no firm or consumer has any power whatsoever to control prices to any extent is in the purely theoretical situation of perfect competition. In the case of perfect competition, the price-elasticity of supply is perfectly elastic when viewed from the consumers' perspective, and the price-elasticity of demand is perfectly elastic when viewed from the firm's perspective. Prices thus cannot be changed by either side.[4]

But the concept of perfect competition is purely theoretical, with the implication being that literally every firm and consumer in every market in every economy has the power to control prices to some extent or another. The only differentiating factor between them is the extent of their respective price control powers. This means that, under the Act, the Minister of Transport would effectively be allowed to intervene in any sub-sector in the wider transport sector because the Regulator will always find some extent of market power related to price control since it is impossible for perfect competition to materialise in the real world.

The second aspect of the definition of market power, the power to exclude competition, is also problematic. Firstly, the same argument with respect to the impossibility of perfect competition applies. This aspect would again allow the Minister to intervene in any transport-related market as they please. Secondly, private goods are per definition excludable.[5] If a firm purchases resources, which are always limited at any one particular point in time, they exclude other firms from purchasing those same resources. They have thus excluded competition to a certain extent by acquiring a segment of the limited available resources, making it more difficult for competitors to do the same at that point

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4 Mohr, PJ *et al*. *Economics for South African students*. (2015, 5th ed). 33. Van Schaik Publishers. Pretoria.

5 Black, P., Calitz, E., & Steenekamp, T. *Public Economics*. (2017, 6th ed.) 39. Oxford University Press Southern Africa. Cape Town.

in time. Competition has thus been excluded, if only temporarily. But the Act does not specify the extent of the exclusion of competition that is either allowable or prohibited, again leading to a situation where the Minister would be able to intervene in any market they desire.

The third and last aspect of market power, behaving to an appreciable extent independently of its competitors, customers, or suppliers, is problematic mainly because of its extreme ambiguity. The Act does not define what is meant by "an appreciable extent". But even if the Act did define what is meant by this phrase, market entities can never be independent of each other. It is simply not how markets function. Ironically, Karl Marx articulated this concept best when he voiced the notion "from each according to their ability, to each according to their need".[6]

The market is a continuous process where entities produce according to their abilities in order to meet the needs of others so they can be remunerated for it and proceed to meet their own needs in turn. There exists no such thing as independence in the market in the first place, so for the Act to define market power partly as the ability to behave independently to an "appreciable extent" is axiomatically flawed.

If this definition is left to stand as is, it would be giving both the Regulator and the Minister of Transport sweeping discretionary powers that could be exercised arbitrarily. This stands in stark contrast to the Rule of Law.

Clause 4(4)(b) states that the Regulator established in terms of clause 29 of the Act must find that a facility or resource in the market is an essential facility. In clause 1 of the Act, an "essential facility" is defined as a facility or resource that cannot reasonably be duplicated, and without access to which competitors cannot reasonably provide goods or services to their customers. These two aspects will be dealt with separately.

The first aspect, that of reasonable duplication, is ambiguous at best. The Act does not specify any criteria to be used to determine whether reasonable duplication of a resource is at all possible. Neither does the Act define what is meant by the concept of reasonable duplication.

The second aspect, which relates to the possibility of competitors being reasonably able to provide goods and services, is also flawed because of its ambiguity. No requirements are set out to determine what circumstances constitute an environment conducive to the reasonably possible provision of goods and services. All markets have some form of entry barriers, and while the extent of these barriers can differ widely, the onus here is on the state to justify what level of barriers are considered to constitute the aforementioned environment.

Clause 4(7) grants the Minister the power to grant an exemption from the Act. Whilst it is preferable that government minimises regulations imposed on the economy and the entities therein, the basis for exemption from this Act are rooted in the absence of the conditions discussed above. This is problematic because, as explained above, such absence cannot occur, hence exemptions from the Act can never occur. Whilst this might be in consonance with the notion of equal application of the law, when exemptions do inevitably occur, they will have no solid legal basis under the Rule of Law because the conditions required to qualify for exemption are themselves rooted in other unreasonable criteria.

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[6] The Metaphysics Research Lab, Center for the Study of Language and Information. *Socialism*. 2016. Stanford Encyclopaedia of Philosophy.

The Minister of Transport is granted unconstrained discretionary powers by clause 4(1) with respect to the procedural requirements, specifically those relevant to clauses 4(5)(b) and 4(7), by giving the Minister unfettered powers to decide on the timing, manner, and form of procedures relevant to clause 4(5)(b), and even the procedures relevant to clause 4(7) themselves.

Clause 4(10)(c) is also extremely ambiguous because it simply refers to "other matters" that are required for the proper application of this Act. What are these other matters? Considering that the clause dealing with the actual application of the Act is extremely unreasonable because it gives the Minister *carte blanche* power on which entities to impose regulations, it suffices to say that the phrase "other matters" can be construed as entailing an almost innumerable amount of conceivable situations. This is a direct transgression of the Rule of Law since the latter requires limitations on discretionary powers.

2.2 Clause 5: Determination of access costs and review of access agreements

The entirety of clause 5 is problematic because it relies on ministerial determinations made in terms of clause 4 which is itself problematic for the reasons discussed above.

Specifically, clause 5(3) infringes on the freedom to contract, which is inherently rooted in the right to freedom of association enshrined in section 18 of the Constitution. The right to freedom of association is written in an unqualified manner; it entails no internal limitations. If government wants to place limitations on it through legislation, it must be able to justify such limitations in terms of section 36 of the Constitution, which deals with the limitations of rights enshrined in the Bill of Rights.

Section 36 states that the rights in the Bill of Rights may only be limited in terms of a law of general application. The 'law of general application' requirement entails that the law in question must be sufficiently clear and precise and that it must apply equally to all and not be arbitrary in its application.[7] Clause 5(3) will only apply based on determinations made in terms of clause 5(1), which in turn is rooted in clause 4. Clause 4 does not qualify as a law of general application because its provisions are very ambiguous – in other words, it falls almost entirely to ministerial discretion how the law will be applied, as opposed to applying generally.

The provision in clause 5(3) thus unjustifiably infringes on the right to freedom of association because the limitation placed on this right relies on initial determinations made that are not consonant with the 'law of general application' requirement.

2.3 Clause 6: Fee prescriptions by Regulator

The Regulator is provided with extensive, almost unlimited powers to set fees pertaining to various aspects of access applications made in terms of the Act. However, there are no objective criteria accompanying this discretionary power afforded to the Regulator to guide, and most importantly limit them, in their exercise of their discretion.

It is imperative that discretionary powers be curtailed by objective criteria that provide certainty and clarity to legal subjects on how government officials may opt to exercise their discretion, otherwise

[7] Currie, I. & De Waal, J. *The Bill of Rights Handbook*. (2016, 6th ed.) 155-156. Juta and Company (Pty) Ltd. Cape Town.

unelected officials are given the power to do however they please. This is incompatible with the democratic values underlying the Constitution.

2.4 Clause 8: Regulator being appointed as dispute arbitrator

Clause 8(1) stipulates that an access seeker must first try to negotiate the terms of an access agreement with an infrastructure owner in good faith, but if this fails then either party may refer the dispute to the Regulator for resolution in terms of clause 8(2).

Resolving contractual disputes falls under the jurisdiction of the judiciary, a legitimate organ of state constituted in terms of the Constitution. The Regulator is not a constitutional institution of any sort and should not be afforded powers to intervene in disputes that fall under the purview of the judiciary. While it is true that other institutions in the executive branch of government, such as tribunals, have been granted quasi-judicial powers, this trend is unfortunate. It is submitted that to comply with the constitutional separation of powers, institutions exercising judicial powers and engaging in judicial functions, should be established and operated as components of the judiciary, independent of the executive government.

Clause 8(3) again provides a discretionary power to the Regulator with respect to the determination of the time period in which written representations must be made to the Regulator by both parties to a dispute related to access agreement. There are no guiding criteria accompanying this discretionary power afforded to the Regulator. The regulator can thus set any time period they please and it would be indisputable.

Clauses 8(4)-(7) are based on a flawed assumption: that the Regulator, a random government official, is better equipped to make a determination that relates to the issue of system efficiency than the impersonal and unbiased price mechanism would. Almost nothing in the world guides human behaviour better than the price mechanism, because the latter includes and relays an inconceivable amount of information in a single, universal language (monetary prices) and expresses it as a simple numerical value. It is a tall, if not impossible, order to argue that a government bureaucrat could know better than such a system of information.

2.5 Clause 9: Decision on access approval

Clause 9(1) provides that if all requirements set out in clause 8(4) are met, the Regulator must grant access approval. Clause 9(2), however, states that the Regulator may still grant access approval even if the requirements of clause 8(4)(a) are not met, provided only that the access seeker has given a written undertaking to the Regulator to fund the required investment in infrastructure. Clause 8(4)(a) requires that there be available capacity on the infrastructure/facility in question.

This is again a very ambiguous discretionary power conferred upon the Regulator. Clause 9(2) does not stipulate that the Regulator *must* grant access approval even if the requirement in clause 8(4)(a) is not met. It only stipulates that the Regulator *may* grant access, which implies that the Regulator can exercise discretion on whether to do so. Yet the clause does not stipulate how the Regulator must exercise this discretionary power. They can simply decide to grant or deny access in terms of clause 9(2) on a mere whim, which is completely unacceptable.

Clause 9(5) also confers unfettered discretionary powers on the Regulator pertaining to access agreement terms. There is no way for legal subjects to even contemplate the possible terms that the Regulator might decide to impose on parties.

2.6 Clause 11: Determination of price controls

Clause 11(2) makes provision for arbitrary price controls, including limits placed on the total revenue an entity can raise and the return it may derive from its assets. It also gives the Regulator the power to impose "any other appropriate pricing method". Once again, we are dealing with extensive discretionary power conferred upon a government bureaucrat with absolutely no guiding criteria whatsoever accompanying the power in question. The Regulator can therefore, theoretically, impose any price control measure they see fit without so much as a proper reason.

Clause 11(3) simply makes no sense. It implies that a regulated entity would ask the Regulator to implement price controls on their own facilities. There is no logical, rational reason why any entity who is the subject of the regulations would ask to be regulated even further. The only possible conclusion that can be drawn from this is that government effectively wants to force entities subject to regulation to 'ask' to be the subjects of price control.

Clause 11(4) deals with the procedural requirements related to the proposal referred to in clause 11(3). Clause 11(4)(b)(i)-(viii) sets out the factors that the Regulator must take into consideration before determining whether the proposal is fair and reasonable.

Clause 11(4)(b)(i) stipulates that the Regulator must consider the regulated entity's operating efficiency and effectiveness. Again, neither of these two concepts are defined in the Bill. The Regulator thus has *carte blanche* power with respect to determining whether a regulated entity is indeed efficient and effective based on the Regulator's own subjective convictions pertaining to efficiency and effectiveness.

Clause 11(4)(b)(ii) stipulates that the Regulator must consider the need for investment and security of supply in the regulated market. How will the Regulator do this? The Bill does not include this crucial information. Yet another extensive discretionary power afforded to the Regulator.

Clause 11(4)(b)(iii) stipulates that the Regulator must determine the opportunity cost of capital. This is an insurmountable task. Opportunity cost refers to possible returns on alternatives investments that are foregone in favour of investing in something else.[8] The alternatives are almost endless. There is simply no way that the Regulator can determine what these opportunity costs are since no single entity on Earth has the omniscience required to make such a determination apart from the price mechanism itself.

Clause 11(4)(b)(v) gives another unrestricted discretionary power to the Regulator that allows the Regulator to determine whether a certain characteristic in a market is relevant to reasonable cost differentials between different types of facilities/services provided, based solely on their own subjective preferences What criteria should the Regulator use to determine whether a specific characteristic is indeed relevant or not? Should a regression analysis be done to determine in an econometric manner whether the characteristic is statistically significant as it relates to its influence

[8] Mohr, PJ *et al*. (footnote 4 above). 5.

on the price differential, for example? As the clause stands, the Regulator can simply deem any characteristic to be relevant.

Clause 11(4)(vi) stipulates that the Regulator must determine the likely effect of the proposed price control on "the economy, employment, consumers and small or medium enterprises." The first problem with this provision is that it discriminates against juristic persons (enterprises) and by extension against natural persons as well (the owners of the enterprises) based purely on the size of the enterprise. What clause 11(4)(vi) implies is that the negative effects of proposed price controls on large enterprises should be considered irrelevant. Such discrimination is inherently unfair. Section 9 of the Constitution enshrines the right to equality before the law and this right may only be limited in terms of the internal limitation provided in sections 9(2) and 9(5). The discrimination against large enterprises is unfair because small and medium enterprises are not a category of legal persons disadvantaged by unfair discrimination.

In *President of the Republic of South Africa v Hugo*, the Constitutional Court elaborated on the provision in s9(2) when it said that "persons belonging to certain categories have suffered considerable unfair discrimination *in the past"* (own italics).[9] The legal discrimination that occurred in the past under Apartheid was not rooted in the size of business enterprises but in race. It therefore makes no sense to argue that juristic persons should be discriminated against purely because they are larger in size, however this size is determined.

Clause 11(8)(a) gives the regulator the power to determine price controls, either proposed by a regulated entity or varied by the regulator, with or without conditions. The problem with this provision is that no mention is made of how the Regulator must go about determining whether certain conditions must apply and what those conditions must be in the first place.

Clause 11(8)(b) gives the Regulator the power to reject a price control proposal and ask for a new proposal to be submitted, which may include the requirement to propose a completely different price control than originally proposed. The clause does not elaborate on how the Regulator must go about evaluating whether it should be rejected or not.

Clause 11(9) is problematic in its entirety. It sets out certain conditions that the Regulator may impose yet does not specify how the Regulator must go about deciding whether said conditions must be imposed or not.

Clause 11(11) extends the Regulator's unrestrained discretionary powers even further. It stipulates that the Regulator *may* review the impact of a proposed price deviation and determine whether or not to approve it. The Regulator may thus simply ignore any requests submitted to them without so much as a valid reason. Another problem with the clause is that it stipulates that the Regulator may, within 15 business days of receipt of the request, review it within 60 business days. The only sensible interpretation of this almost nonsensical provision is that after a request is received by the Regulator, they can effectively wait 3 weeks to simply decide whether they want to review it, and if they choose to review it, they have another 15 weeks to do so. The total process can thus take up to 17 weeks. Such a lag imposes a considerable burden on regulated entities.

2.7 Clause 12: Extraordinary review of price controls

[9] *President of the Republic of South Africa and Another v Hugo* 1997 (4) SA 1 (CC).

The issue in clause 12(1) is that it gives the Regulator the discretionary choice on whether to conduct an extraordinary review on price controls imposed if the Regulator is "satisfied" that unforeseeable changes in certain economic factors threatens the economic sustainability of a regulated entity. What the clause should stipulate is that the Regulator *must*, not *may*, conduct an extraordinary review on all price controls, both those imposed and those merely considered, if the economic sustainability of a regulated entity is threatened. In its current format, the clause provides the Regulator with the untamed power to kill off regulated entities by simply refusing to review price controls imposed that constitute a threat to a regulated entity's viability. It is easy to see how such a provision might incentivise corruption, where price controls will only be reviewed after certain functionaries have received bribes or other process-lubricating gifts.

Clause 12(2) merely exacerbates the problem by expressly stating that the Regulator may conduct an extraordinary review in terms of subsection (1) either on its own initiative, or on application by the relevant regulated entity, the Minister of Transport, or another directly affected person. Once again, the Regulator is given the power to simply opt not to review price controls detrimental to regulated entities. A serious problem in clause 12(2) is that it implies that even when the Minister themselves apply to the Regulator to review price controls, the Regulator may simply choose to ignore the request. The Regulator would thus be rendered unaccountable even to the Minister.

2.8 Clause 13: Information from regulated entities

Clause 13 infringes on the right to privacy enshrined in section 14 of the Constitution. Section 14 provides that the right to privacy includes the right of persons not to have their property searched. Provided that a regulated entity is not a publicly traded company, the right to privacy is being infringed by the requirement that each regulated entity must submit to the Regulator statistical information related to the facilities/services it provides or has licenced others to provide as well as development plans for facilities/services it provides or has licenced others to provide.

It is important to note that a 'regulated entity' in terms of the Act "means any entity to which this Act applies in terms of section 4(1) or a declaration contemplated in section 4(2)." As discussed earlier in item 2.1 of this document, the Act would effectively enable government to demand private statistical information from any business that finds itself within the transport sector.

In terms of sections 8(4) of the Constitution, the Bill of Rights applies to juristic persons insofar as the nature of the right and the nature of the juristic person requires that the juristic person be entitled to the right.

The right to privacy stems from the protection of human dignity. Therefore, juristic persons should only be entitled to a modified version that grants reduced protection.[10]

However, the courts' approach to the issue of legal standing to challenge discrepancies between provisions in the Bill of Rights and laws renders the provision in section 8(4) of the Constitution pertaining to the nature of the rights and juristic person effectively irrelevant.[11]

Any person has standing to challenge the constitutionality of laws or conduct provided that they allege that a fundamental right is being infringed or threatened and they have a sufficient interest in

[10] Currie, I. & De Waal, J. (footnote 7 above). 36.
[11] Currie, I. & De Waal, J. (footnote 7 above). 37.

obtaining a remedy in terms of section 38 of the Constitution. It is sufficient to show that *a* right is in danger of being violated or is being violated. It is not necessary to show that a right *of the applicant themselves* has been violated. Only when a law violating rights impacts solely on a juristic person will it not be possible to follow the abovementioned course of action.

However, the violation of privacy also directly affects the natural persons who own the juristic person subject to regulation under this Bill, and not just the juristic person itself. Juristic persons become worthy of protection when they are used by natural persons for the collective exercise of their fundamental rights.[12] Section 22 of the Constitution enshrines the right to freedom of trade, occupation, and profession, and whilst it makes provision for regulation thereof, such regulation cannot be of such a nature that it unjustifiably infringes on the right to privacy in the process.

It is thus justified to argue that clauses 13(a) and (c) unjustifiably infringes on the right to privacy of not only the juristic persons under regulation, but by extension to the natural persons that stand behind the juristic person. The natural persons behind the juristic person are exercising their section 22 right to freedom of trade, occupation, and profession, and cannot possibly suffer from privacy violations because of this legitimate exercise of a fundamental human right.

2.9 Clauses 14(1) and (2): Regulatory accounting and disclosure requirements

Clauses 14(1) and (2) stipulate that the Regulator must set standards for the preparation and presentation of financial and other information by regulated entities to be considered in any price control determination. The Regulator must also lay out the criteria to be used for the valuation and allocation of assets by regulated entities and that regulated entities must submit this information in accordance with these standards and criteria. This is a clear violation of established accounting standards.

Section 203 of the Companies Act 71 of 2008 established the Financial Reporting Standards Council (FRSC) as the legally constituted standard-setter for South Africa. In terms of section 204 of the Companies Act, the FRSC must consult with *the Minister* on the making of regulations establishing financial reporting standards subject to requirements set out in section 29(5) of the Companies Act. Section 29(4) of the Companies Act also prescribes that the Minister and the FRSC must consult with each other with respect to prescribing financial reporting standards.

Allowing the Regulator to set standards pertaining to the preparation and presentation of information by regulated entities that includes criteria for the valuation and allocation of the regulated entities' assets undermines the provisions in the Companies Act and constitutes a form of delegated law-making power not consonant with existing law.

2.10 Clause 17(2): Regulator directing inspections in the absence of complaints

This clause provides the Regulator with more unrestrained discretionary powers. It empowers the Regulator to direct an inspector to commence an investigation on the Regulator's own initiative, even if the Regulator has not received any complaints in terms of clause 15(1)(c)-(g). There is no guiding to criteria to regulate how the Regulator should go about deciding whether to launch an investigation. Another issue is that the Regulator may decide to launch a complaint even when no complaint has

[12] Ibid

been received. If there are no parties aggrieved to the extent that they want to submit an official complaint in terms of the Act to the Regulator, how is the Regulator to decide that an investigation is justified?

2.11 Clause 17(3): Regulator empowered to appoint any person(s) to assist an inspector in conducting an investigation

The Regulator, in terms of this clause, is empowered to designate any one or more persons to assist the inspector in conducting an investigation without any criteria that lays out what qualifications such an assistant must possess over. It opens the door for extensive abuse of power by government as these appointed assistants may act in a way that biases an investigation.

2.12 Clause 17(4): Regulator empowered to determine investigation procedures

It is highly problematic that the Regulator has the discretion to determine procedures for conducting investigations, but this is exacerbated even further by the inclusion of the provision "with due regard to the circumstances of each case". This implies that the Regulator may change investigation procedures on a case-by-case basis. This is a blatant transgression of section 9(1) of the Constitution which enshrines the right to formal equality. If government deems it preferable to transgress section 9(1), they ought to 1) prove that the discrimination they desire can be considered 'fair', and 2) lay out the criteria that the Regulator should follow should the latter opt to amend investigation procedures in certain instances.

2.13 Clause 18: Regulator's optional courses of action after receiving investigation report

Clause 18 again confers extensive discretionary powers on the Regulator. The operative word in the clause is "may". It is problematic because it implies that the Regulator may opt not to undertake any of the five actions listed in the clause after receiving an investigation report. It would be advisable that the clause substitute the word "may" for the words "must either". Concomitant to this substitution, clear criteria must be set out that will guide the Regulator's decision on which of the five listed actions to undertake.

2.14 Clause 20: Issuance of compliance notices

Subsection 5 stipulates that the Regulator may, in light of non-compliance with a compliance notice, either refer the matter to the National Prosecuting Authority, or direct a price control reduction. The provision lacks any criteria necessary to not only guide the Regulator in deciding which of the two options to undertake, but also to provide legal subjects with clarity on how a Regulator must decide on which action to undertake.

2.15 Clause 21: Directed price control reduction

The Regulator is afforded discretion to determine whether a price control reduction may either be temporary or permanent, yet no mention is made of how the Regulator must go about determining the temporality of the reduction. The factors to be considered that are listed in subsection (2) of the clause only relate to the appropriateness of the reduction itself, or the magnitude of the reduction. From the wording, it is reasonable to infer that said factors do not apply to the consideration of

whether the reduction must be temporary or permanent. It is unclear how the Regulator will go about deciding whether to make any price control reduction permanent or not. If a price control reduction is declared by the Regulator to only be temporary, the Regulator still has the discretion to decide on the period for which the reduction would apply. Again, there are no guiding criteria set out for the purpose of guiding the Regulator in their decision.

It is also problematic that any reduction must not be included in the consideration of price controls in the next price control determination cycle. This creates the possibility for the Regulator to implement further price control reductions irrespective of the fact that such reductions have already been implemented. Such actions could have serious consequences for regulated entities with respect to cash flow and economic feasibility.

Subsection (4) does attempt to place a limitation on the extent of any considered price control reductions by providing that the total annual financial cost thereof imposed on a regulated entity may not exceed more than 10% of the entity's annual turnover of its regulated business. Whilst this limitation on the Regulator's power is noble, it is inadequate. The first issue is that the 10% threshold is inherently arbitrary, with no indication of why it was decided to set the threshold at 10%.

Furthermore, a lot of businesses operate on tight profit margins. Implementing a price control reduction of which the cost is equal to 10% of annual turnover, means effectively cutting turnover by 10%, as the cost of a price control reduction takes the form of opportunity costs (lost revenue). This can have serious deleterious effects for regulated entities.

What the regulation also does not consider is that price control reductions usually lead to subsequent shortages. By limiting the power of profit margins as market signals, government is inhibiting the ability of market entities to respond to shortages and alleviate them. A better option would be to subsidise the costs of sales of entities so that prices can decrease but entities would still be in the same financial position as they were before. It would preclude shortages from occurring and may serve to entice other providers to enter the sector. The government will bear the cost of the subsidy but is a much more feasible solution that imposing those costs on market entities in the form of opportunity costs and shortages.

2.16 Clause 25: Powers of Council at hearing

Clause 25 confers extremely broad discretionary powers on the Council. Specifically, the power given to the Council to give directions prohibiting/restricting the publication of *any* evidence given to the Council, without laying out clear, reasonable criteria that will guide how the Council decides which evidence to censor, is problematic. For instance, if the Council opts to censor evidence in a hearing that is of interest to the public by preventing the press from reporting on it, it would have serious implications for freedom of the press and other media. It is trite that legal proceedings in public institutions are open to the public, unless exceptional circumstances justify them being closed. Yet, in this instance, there is not provision curtailing the powers of the Council to censor certain information.

2.17 Clause 26: Rules of procedure

Clause 26 places a duty upon the Council to establish rules for its proceedings. However, subsection (b) of clause 26 stipulates that the Council has the option of determining any matter of procedure for a particular hearing, with due regard to the circumstances of the case. Notwithstanding the problematic nature of such an open-ended provision, the fact that no factors are listed which the Council must take into consideration when amending procedures for a particular hearing is problematic. When read in its entirety, clause 26 effectively provides open-ended powers for the Council to determine procedures, with no framework to guide them in doing so.

2.18 Clause 29: Establishment of Transport Economic Regulator

The independence provided to the Regulator is very concerning. It has the effect of elevating the Regulator to a judge in a court of law. It is highly disconcerting that the Regulator is said to be only subject to the Constitution and the law, implying that the necessary intermediary institution, Parliament, does not have oversight. Parliamentary oversight is an important mechanism in the framework of checks and balances in an open and democratic society. We submit that it must be explicitly provided for that Parliament will have oversight over the Regulator.

Whilst the intention behind the provision obligating the Regulator to exercise their functions in the most cost-efficient and effective manner might be good, the Act does not define what is regarded as cost-efficient or cost-effective, nor does the clause set out certain criteria that could be used to measure said efficiency or effectiveness.

2.19 Clause 31: Qualifications of Board membership

Amongst other things, clause 31 provides for non-executive members of the Board to be "suitably qualified" but fails to make mention of which qualifications suffice for appointment.

2.20 Clause 38: Functions of the Regulator

Section 38 is ambiguous in its clarification of the functions of the Regulator. For instance, the section refers to nebulous concepts such as "efficiency", "equitable access", "appropriate investment", and "functioning competitively", yet nowhere in the Bill are these concepts defined in order to guide the Regulator. The Regulator is effectively afforded extensive power to subjectively determine what constitutes efficiency and adequate competition and what does not.

2.21 Clause 39: General provisions concerning Regulator

Clause 39(1) provides that the Regulator *may* have regard to regional/international developments in the field of economic regulation of transport, and the Regulator *may* also consult any person, organisation, or institution with regard to any matter.

This provision is problematic because it affords the Regulator the option to opt out of consulting what amounts to foreign and/or international law on the topic at hand. Whilst South African law places no express duty on executive organs of state to heed international law on the issue of regulatory matters, it is highly advisable that they do. The Regulator is also afforded the option of opting not to consult with anyone else on any matter.

It is highly advised that this clause should place an obligation upon the Regulator to both consult international law as well as other persons/organisations/institutions.

2.22 Clause 42: Research and public information

Clause 42, in general, provides an important framework to promote transparency and accountability on the part of the Regulator, but where it fails in this regard is in clause 42(d). The latter clause provides that the Regulator *may* provide guidance to the public through the issuing of explanatory notices regarding procedures or applying to a court for a declaratory order. Whilst the latter should only be optional and not necessarily mandatory, the former option (issuing of explanatory notices) should preferably be made mandatory in order to advance the principle of transparency as enshrined in section 195(g) of the Constitution.

2.23 Clause 43: Relations with other regulatory authorities

Clause 43(2) again ties into the issue of the Regulator being afforded vast discretionary powers, mostly because of ambiguity relating to concepts such as "anti-competitive outcomes", and the fact that this provides the Regulator ample breathing space to intrude and distort the market.

The requirement in clause 43(3) of a notice of a market inquiry being gazetted at least 20 business days before the commencement of said inquiry is woefully inadequate.

Clause 43(4) is extremely problematic because it provides the Regulator with extensive power to decide on how to conduct a market inquiry. In fact, the provision goes as far as explicitly saying that the Regulator "may conduct a market inquiry in any matter". Granted, the provision does go further and stipulates that the provisions of clauses 57 to 60, read with the changes required by the context, apply to the conduct of the market inquiry. However, this is quite an ambiguous provision that does not adequately serve the goal of curtailing discretionary powers, nor does it adequately serve the goal of enhancing accountability, another constitutionally enshrined value of public administration.

2.24 Clause 45: Minister may call for inquiries or investigations

Clause 45(2)(a) may well be considered as the worst clause in the entire Bill. It furnishes the Minister of Transport with the power to direct the Regulator to launch what effectively amounts to witch-hunts. The clause provides that the Minister may give written direction to the Regulator to investigate "any matter or circumstances… whether or not those circumstances appear at the time of the direction to amount to a possible contravention of this Act." In layman's terms, this means that the Regulator, on the orders of the Minister, may launch any investigation on a mere whim. The doctrine of probable cause is legally trite, and this directly undermines it and also opens the door for wasteful expenditure, considering the possibility that any such investigation contemplated may turn op nothing.

2.25 Clauses 50 and 51: Annual fees paid by regulated entities

Clauses 50(1)(a) and 51(1) jointly place an obligation on regulated entities to partially finance the Regulator and the Council. Considering the fact that South Africa is experiencing a severe economic downturn due to the COVID-19-induced lockdown. This downturn, along with weak long-run growth and the fact that the transport sector is heavily integrated with all economic sectors, means that

thrusting even more administrative costs upon them would be highly detrimental to their economic viability, especially those transport companies who qualify as SMEs.

2.26 Clause 55(2)(c): Appointment of investigators and declaring them 'peace officers'

This clause provides for inspectors appointed by the Chief Executive Officer of the Regulator to have the powers of a peace officer as defined in section 1 of the Criminal Procedure Act (CPA) 51 of 1977, with the concomitant right to exercise such powers.

The problem, however, is that for an inspector to have the powers of a peace officer, they are effectively declared as peace officers for all intents and purposes. Such a declaration requires a specific notice to be gazetted by the Minister of Justice, in terms of section 334(1)(a) of the CPA. If the Bill is adopted, clause 55(2)(c) would undermine this requirement by declaring the inspectors as peace officers without any gazetted notice by the Minister of Justice.

The overall context of clause 55 is also extremely worrying. It speaks to the intention of government, which is effectively trying to criminalise "anti-competitive" behaviour by affording the same legal title to said 'inspectors' as that of police officers.

2.27 Clause 56: Subpoena powers of executive officers

Clause 56 bestows the power to subpoena on the "… Chief Executive Officer or any other Executive Officer…". Considering clauses 56 and 55 as well as clause 46, which deal with the establishment of the Transport Economic Council, what government is effectively doing is setting up a kangaroo court that, for all intents and purposes, seeks to treat economic actors within the transport sector as anti-competitive 'criminals'. This is an affront to the rights to just administrative action and due process as enshrined in sections 33 and 35 of the Constitution.

2.28 Clause 60: Claims that information is confidential

Whilst the inclusion of a provision that enables a person to lodge a claim of confidentiality, clause 60(3)(b) completely undermines the constitutional imperative of transparency, as well as the imperative of guarding against arbitrary exercises of power under the Rule of Law.

The clause in question stipulates that, when faced with a claim of confidentiality, the Regulator must immediately come to a decision, but that the decision itself "may or may not be supported by reasons". This is asinine thinking that undermines everything dear about a society that regards constitutionalism and the Rule of Law not only as legal imperatives, but as moral imperatives as well.

Contrast this provision with clause 60(2), which obliges persons laying claims of confidentiality to support their claim with a written statement explaining their reasons. The effect of this is that, along with undermining the constitutionally enshrined principle of transparency, along with the Rule of Law imperative of non-arbitrary governance, clause 60(3)(b) also entrenches the asinine notion that government officials must be held to a lower standard than private legal persons. Such a phenomenon has the implication that the law does not apply equally to the governors as it does to the governed.

2.29 Clause 62: Breach of confidence

Clauses 62(1)(a) and 62(2)(a) seem to contradict one another. The former clause states that it is an offence to disclose any personal or confidential information in carrying out any function in terms of this Act, yet the latter clause states that the former clause does not apply to information disclosed for the purpose of the proper administration or enforcement of the Act.

It is entirely reasonable to presume that all information disclosed during any proceedings in terms of the Act is done exactly for the purpose of the proper administration and enforcement of the Act, otherwise there is absolutely no reason why the information has to be disclosed in the first place. Clause 62(2)(a) thus serves to create an exception for nearly all confidential/personal information disclosed, as all such information, as mentioned above, is presumably only disclosed in order for the Act to be properly administered and enforced.

When read with the problematic clause 60, which is discussed above, the Bill, if adopted, would entail severe dangers for the right to privacy as enshrined in section 14 of the Constitution.

3. Constitutionalism and the Rule of Law

3.1 Constitutionalism

A constitution, properly understood, is a special type of law that, unlike other laws, addresses itself to the government of a society, and lays out what that government may, and crucially, what it *may not* do. The core idea of constitutionalism is that *everything which government is not explicitly allowed to do, is forbidden.* Constitutions are one of those things a society cannot afford to get wrong, because they are not transient. All future governments – not always of the same political party – will interpret them differently and according to their own ideological frameworks.

Chapter 2 of the Constitution does not 'create' rights, but merely protects pre-existing rights. Indeed, section 7(1) states that the Bill of Rights "enshrines" the rights, not creates them. Sir Thomas More once aptly noted:

> "Some men think the Earth is round, others think it flat. But if it is flat, will the King's command, or an Act of Parliament, make it round? And if it is round, will the King's command, or an Act of Parliament, flatten it?"

Enshrining something, in the constitutional sense, means to place that thing somewhere where it is protected, in this case, in a constitution.[13] But legislation cannot change reality, in this case being the reality of rights: South Africans have rights outside of the Constitution, and if a provision in the Bill of Rights is repealed or legislation undermines a right, that does not mean South Africans 'lose' that right. If this were the case, there would be little use in referring to rights as 'human' rights, as section 1 and the Preamble of the Constitution do. We are rights-bearing entities because we are humans with dignity and individuality, not because government has 'given' us those rights.

If protection for human rights is undermined, South Africa's constitutional project will be severely undermined in that the Constitution will continue to recognise the rights in question, but will not protect them effectively. This is not a situation South Africans would want to find themselves in.

3.2 The Rule of Law

Section 1(c) of the Constitution provides that South Africa is founded upon the supremacy of the Constitution and the Rule of Law. Section 2 provides that any law or conduct that does not accord with this reality is invalid. This co-equal supremacy between the text of the Constitution and the doctrine of the Rule of Law remains underemphasised in South African jurisprudence, but it is important to note for the purposes of this submission.

One of the Constitutional Court's most comprehensive descriptions of what the Rule of Law means was in the case of *Van der Walt v Metcash Trading Ltd*. In that case, Madala J said the following:

> "[65] The doctrine of the rule of law is a fundamental postulate of our constitutional structure. This is not only explicitly stated in section 1 of the Constitution but it permeates the entire Constitution. The rule of law has as some of its basic tenets:

[13] See https://dictionary.cambridge.org/dictionary/english/enshrine.

1. the absence of arbitrary power – which encompasses the view that no person in authority enjoys wide unlimited discretionary or arbitrary powers;

2. equality before the law – which means that every person, whatever his/her station in life is subject to the ordinary law and jurisdiction of the ordinary courts.

3. the legal protection of certain basic human rights.

[66] The concept of the rule of law has no fixed connotation but its broad sweep and emphasis is on the absence of arbitrary power. In the Indian context Justice Bhagwati stated that:

'the rule of law excludes arbitrariness and unreasonableness.'

I would also add that it excludes unpredictability. In the present case that unpredictability shows clearly in the fact that different outcomes resulted from an equal application of the law."[14]

The Rule of Law thus:

- Permeates the entire Constitution;
- Prohibits unlimited arbitrary or discretionary powers;
- Requires equality before the law;
- Excludes arbitrariness and unreasonableness; and
- Excludes unpredictability.

The Good Law Project's *Principles of Good Law* report largely echoed this, saying:

"The rule of law requires that laws should be certain, ascertainable in advance, predictable, unambiguous, not retrospective, not subject to constant change, and applied equally without unjustified differentiation."[15]

The report also identifies four threats to the Rule of Law,[16] the most relevant of which, for purposes of this submission, is the following:

"[The Rule of Law is threatened] when laws are such that it is impossible to comply with them, and so are applied by **arbitrary discretion** […]"

Friedrich August von Hayek wrote:

"The ultimate legislator can never limit his own powers by law, because he can always abrogate any law he has made. The rule of law is therefore not a rule of the law, but a rule concerning what the law ought to be, a meta-legal doctrine or a political ideal."[17]

What is profound in Von Hayek's quote is that he points out that *the* Rule of Law is not the same as *a* rule of *the* law. Indeed, any new Act of Parliament or municipal by-law creates and repeals multiple 'rules of law' on a regular basis – expropriation without compensation would be an example of 'a' rule of 'the' law. The Rule of Law is a doctrine, which, as the Constitutional Court implied in *Van der Walt*, permeates all law, including the Constitution itself.

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[14] *Van der Walt v Metcash Trading Ltd* 2002 (4) SA 317 (CC) at paras 65-66. Citations omitted.
[15] Good Law Project. *Principles of Good Law.* (2015). Johannesburg: Law Review Project. 14.
[16] Good Law Project (footnote 15 above) 29.
[17] Von Hayek FA. *The Constitution of Liberty.* (1960). 206.

Albert Venn Dicey, known for his *Introduction to the Study of the Law of the Constitution*, and considered a father of the concept of the Rule of Law, wrote that the Rule of Law is "the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even wide discretionary authority on the part of the government".[18]

Dicey writes "the rule of law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of constraint".[19] He continues, saying the Rule of Law means "the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government".[20]

The opposition to arbitrary power should not be construed as opposition to discretion in and of itself. Officials use discretion to determine which rules to apply to which situation, and thus some discretionary power is a natural consequence of any system of legal rules. However, the discretion must be exercised per criteria which accord with the principles of the Rule of Law, and the decision itself must also accord with those principles.

A common example of arbitrary discretion is when a statute or regulation empowers an official to make a decision "in the public interest". What is and what is not "in the public interest" is a topic of much debate, and empowering officials to apply the force of law in such a manner bestows upon them near-absolute room for arbitrariness. The "public interest", however, can be one criterion among other, more specific and unambiguous criteria.

The fact that some discretion should be allowed is a truism; however, the principle that officials may not make decisions of a substantive nature still applies. Any decision by an official must be of an enforcement nature, i.e., they must do what the legislation *substantively* requires. For instance, an official cannot impose a sectoral minimum wage. The determination of a minimum wage is properly a legislative responsibility because it is of a substantive nature rather than mere enforcement.[21]

3.3 Socio-economic impact assessments

The opposite of arbitrariness – the principal phenomenon the Rule of Law stands against – is reasonableness. Reasonableness consists of two elements, namely, rationality and proportionality. Proportionality means that there must not be an imbalance between the adverse consequences of a policy and the beneficial consequences.[22] Rationality means that evidence must support the policy. Stated differently, there must be a rational connection between the purpose of the policy and the solutions proposed.[23] It has also been said that a third element, effectiveness, is a part of reasonableness.

It stands to reason that the requirement of rationality, read together with section 195(1)(g) of the Constitution, which provides that transparency "must be fostered by providing the public with timely,

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18 Dicey AV. *Introduction to the Study of the Law of the Constitution.* (1959, 10th edition). 202-203.

19 Dicey (footnote 18 above) 184.

20 Dicey (footnote 18 above) 198.

21 Section 51 of the Basic Conditions of Employment Act (75 of 1997) is therefore evidently unconstitutional.

22 Hoexter C. *Administrative Law in South Africa.* (2012, 2nd edition). Cape Town: Juta. 344.

23 Hoexter (footnote 22 above) 340.

accessible and accurate information", requires that policy or legislative interventions must be supported by demonstrable evidence. To determine whether a policy will have the consequence intended by the enacting authority, a study must be done as a matter of course, and must be publicly available to satisfy the principle of transparency. If a study is not conducted, it means the intervention is not supported by evidence, and is therefore irrational and unconstitutional, and if a study is not released to the public, government is failing to comply with section 195(1)(g), and thus, the process is unconstitutional. Section 195(1)(g) applies to all organs of State, including Parliament.

In *Principles of Good Law*, the Good Law Project writes:

> "Although widely divergent, all the international assessment models amount ultimately to institutionalised procedures for determining the need for a law and its expected benefits. They are also concerned with the cost to government of implementation, as well as the capacity of government to police and enforce the law and the cost to the public of compliance. Other aspects considered are the economic and other likely impacts, the prospect of unexpected or unintended consequences; and the behaviour modifications likely to be promoted by the law and distortions that might flow from them."[24]

It goes on to describe what a SEIA would encompass:

> "2. **Socio Economic Impact Assessment** (SEIA). Multi-faceted analysis *and quantification* of:
>
> 2.1 The purposes of laws – precisely what 'mischief' they are addressing;
>
> 2.2 Desired consequences;
>
> 2.3 Estimated secondary and unintended effects, including impacts on the economy or society in general;
>
> 2.4 Feasibility and efficacy – prospects in practice of the law being observed, and if not, enforced by officialdom, police and the courts;
>
> 2.5 Costs and benefits – accurate and comprehensive estimates of costs of administration and implementation, enforcement and policing, compliance and avoidance/evasion/resistance;
>
> 2.6 Inter-departmental considerations – the extent to which other departments are implicated;
>
> 2.7 Administration and budget – advance provision for all budgetary, staffing, training and related needs; diversion or dilution of resources and capacity."[25]

The Department of Planning, Monitoring and Evaluations' (DPME) SEIA System (SEIAS) guidelines describe the purpose of SEIA as follows:

> "**3 The role of SEIAS**
>
> SEIAS aims:
>
> - To minimise unintended consequences from policy initiatives, regulations and legislation, including unnecessary costs from implementation and compliance as well as from unanticipated outcomes.
> - To anticipate implementation risks and encourage measures to mitigate them."[26]

[24] Good Law Project (footnote 15 above) 34.
[25] Good Law Project (footnote 15 above) 35.
[26] Department of Planning, Monitoring and Evaluation (DPME). "Socio-Economic Impact Assessment System (SEIAS): Guidelines." (2015). 4.

The DPME regards SEIA as more than a mere cost-benefit analysis. SEIA, instead, must contribute to improving policy, rather than measuring their net value. It must, furthermore, "help decision makers to understand and balance" the impact of policy on different groups within society.[27]

That regulations or legislation can lead to unintended consequences is acknowledged by government. It may happen as a result of inefficiency, excessive compliance costs, overestimation of the benefits associated with the regulation, or an underestimation of the risks involved with following through with the regulation.[28]

The SEIA System applies to legislation and regulations, as well as policy proposals, like BBBEE codes.[29]

A proposal of such magnitude as expropriation without compensation should, before further discussion is had on whether it must be pursued, be accompanied with an independent report on the socio-economic consequences that such an amendment will have for society. The DPME's SEIA System would obviously not apply to Parliament, but the constitutional requirements outlined above that apply to all organs of State must clearly be complied with.

4. The folly of price controls[30]

The market is dynamic, constantly balancing the supply of and the demand for products through a spontaneous price mechanism. Can a price regulator react timeously to changes in the market and deliver true benefit to the people?

Attempts to change or 'improve' outcomes by intervening in the economy for political reasons will almost without fail have negative consequences. The reason is that 'the economy' or 'the market' consists of the sum of the activities of the entire population, all attempting to maximise their welfare. In using a mechanism such as price control, government tries to prevent consumers from freely exercising their choices, and simultaneously, to take over the functions normally performed by supply and demand in the market-place.

In their book, *Free to Choose*, Milton and Rose Friedman described why price controls have negative consequences. "Economists may not know much. But we know one thing very well: how to produce surpluses and shortages. Do you want a surplus? Have the government legislate a minimum price that is above the price that would otherwise prevail", they wrote. "Do you want a shortage? Have the government legislate a maximum price that is below the price that would otherwise prevail."

Any fixing of prices in the transportation sector will have the same consequences predicted by the Friedmans, except, since this is a service industry, it is more likely for businesses to either consolidate into a small number of very big companies, or simply close down.

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[27] DPME (footnote 26 above) 7.

[28] DPME (footnote 26 above) 4.

[29] DPME (footnote 26 above) 8.

[30] This section is based largely on the work of Eustace Davie and Jasson Urbach. See: http://www.freemarketfoundation.com/article-view/time-to-reconsider-the-command-and-control-strategy, http://www.freemarketfoundation.com/article-view/price-controls-reduce-access-to-medicines, http://www.freemarketfoundation.com/article-view/government-should-not-fix-medicine-prices, http://www.freemarketfoundation.com/article-view/respect-the-constitution-and-apply-economics-in-the-pricing-of-medicines.

When a regulator, in this case government, is put in control, prices are set only after a protracted research and consideration period, and, once set, a fixed price cannot quickly or spontaneously adjust for changing market circumstances. Benchmark pricing attempts to determine 'acceptable' transport prices by deriving them from average prices for the same products in other countries. While this mechanism may appear to have economic legitimacy, it causes distortions because it is incapable of capturing or simulating all the factors that determine competitive market prices. Price controls therefore distort the pricing mechanism and interrupt the dynamic demand and supply process. History has demonstrated that without market prices, information on relative scarcities cannot circulate and provide the right incentives.

Price setting by government is unavoidably arbitrary, will always have unintended consequences, and cannot be carried out without causing some form of harm.

An American soldier was shot dead in Iraq several years ago while guarding a queue of angry Iraqis waiting in line to buy price-controlled petrol at a government-owned filling station. Had there been competing private petrol stations and no government-set maximum price the tragedy would not have occurred. Prices would have adjusted to a level at which supplies met demand without causing queues of frustrated customers. Similar queues formed when the American government tried to keep petrol prices artificially low during the 1970s. As soon as the price controls were removed, and the price was allowed to increase to its real market level, the queues disappeared. The artificially low price encouraged higher consumption and reduced supply. Logic, or the laws of economics if you will, tell us that was inevitable.

In South Africa, like in most other countries, it is the people who live in large urban areas who have access to the high-volume-low-mark-up retailers able to offer cheaper goods. South Africa's poor generally are restricted to having to shop in low-volume-high-mark-up establishments in the townships and rural areas. Price controls invariably penalise low volume establishments and, potentially, are the cause for many of them to close down.

One of many unwelcome consequences of price controls is that they act as a barrier to entry. Large established businesses will often tolerate or even welcome regulated price controls because they keep competition out of the industry. When prices are regulated so that they are kept low and very little profit is allowed to be made, low-volume-high-mark-up shops, or entrepreneurs trying to enter the market, cannot afford to buy stock from which they will not make a return sufficient to support the normal day-to-day running of their business. High-volume-low-mark-up retailers in large urban areas will be able to do this.

The Pharaohs of ancient Egypt instituted price controls on wheat, ostensibly to prevent a famine. In doing so, they disrupted production and supply and induced a famine that eventually ended their reign. Similarly, the Roman emperor Diocletian instituted stringent price controls in an effort to correct the consequences of earlier price controls on wheat and other goods dating back to the fourth century BC, a situation he exacerbated by debasing the currency. He imposed the death penalty on anyone contravening the controls or withholding goods from the market.

One historian described the result: "the people brought provisions no more to market, since they could not get a reasonable price for them, and this increased the dearth so much that […] the law itself was set aside."

Diocletian paid a price for attempting to buck the laws of economics – he was forced from the throne after just four years. Prices freely formed in a market that has no regulatory barriers to entry or disincentives to production and distribution are essential signals that guide suppliers as to what is in greatest demand and where they must concentrate their productive effort. Remove those essential signals by fixing prices by regulation and the entire information process is destroyed. It is imperative that market prices be left alone.

Perhaps without realising it, government admits to the fact that price controls are a bad idea in section 10(1) of the Bill, which states:

> "At any time after a price control takes effect, the Regulator may conduct an extraordinary review if the Regulator is satisfied that reasonably unforeseeable changes in economic demand, input costs, technology, the regulatory environment or other similar factors have affected the regulated entity sufficiently to constitute a threat to its economic sustainability during the current price control period and thus justify an early review of the price control."

Price controls always bring unintended, mostly detrimental, changes in economic circumstances. While larger businesses might not have their economic sustainability threatened, it is inappropriate to expect small and medium enterprises to react similarly.