



# Review of the Port Tariff Methodology

## Submission

4 November 2019

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# Executive Summary

This submission is compiled by the Shipbuilding and Repair Committee of the South African Aerospace, Maritime and Defence Industries Association (AMD) in response to the Port Regulator's call for public comments on the review of the multi-year tariff methodology (2021/22 - 2024/25). This submission is grounded on the findings of a benchmarking study on port rentals conducted by the Committee in 2019, which is available [here](#).

The shipbuilding and repair industry is important to the economy of South Africa, as it is labour intensive, is less vulnerable to the trend of automation<sup>1</sup>, and has large potential for transformation. The industry holds a prominent role in South African policy, including being an essential element of Operation Phakisa<sup>2</sup>. Despite this, the industry has not yet been able to achieve the impact it could have, partly due to the lease conditions being imposed by TNPA on shipbuilding and repair companies. The lack of alternative land options for shipbuilding and repair activities, as the nature of their activities requires them to operate in ports, means that companies have little leverage to negotiate better lease terms. It is for this reason that the AMD is requesting that the Ports Regulator includes rental tariffs within the tariff approval process.

The legal process outlined in the National Ports Act for open tendering is not being adequately followed, and the approach of TNPA does not reflect an understanding that rent-seeking behaviour is unjustified. Some of the key challenges identified by shipbuilding and repair tenants are as follows:

- The TNPA tender process is unclear, non-transparent and inefficient, resulting in ad-hoc extensions (which are illegal), short lease periods, and lost investment opportunities. Furthermore, TNPA is unwilling to negotiate lease terms and conditions in good faith.
- The rental price is high and, while TNPA claims that the rental is based on market prices, the price determinant is not stipulated in the lease or in any other guideline or document. Legally, the 'market rent' should be determined via competitive open tender process and not stipulated by TNPA, as is currently occurring.

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<sup>1</sup> OECD, (2008). The interaction between the ship repair, ship conversion and shipbuilding industries. *C/WP6 (2008) 6*. From: <https://www.oecd.org/sti/ind/42033278.pdf>

<sup>2</sup> A South African national government action plan to unlock the economic potential of its oceans.

- Escalations are set at 9% annually, which is compounded over 4 years (just over 50% in total). This escalation rate is internationally unprecedented. In addition, at the end of the 5-year lease term or on an ad hoc basis (lease dependent), TNPA is allowed to readjust the lease price based on an updated valuation of the land. Any improvements that have been made by tenants are included in this valuation. The methodology for arriving at 9% is not stipulated in the lease agreement.

In sum, the leases and interviews of shipbuilding and repair companies show that the Section 56 process that aims to provide “a procedure that is fair, equitable, transparent, competitive and cost-effective” is not materialising and this is to the detriment of the industry. The lack of a publicly accessible archive of open calls and the results thereof means that no data exists to shed further light on these issues.

It is important to note that there is provision in the National Ports Act (sections 72 and 73) for rentals to be approved by the Ports Regulator, as rentals are not treated any differently in the Act than are port dues, cargo dues and berth dues, which are included in the Tariff Book. The following recommendations are ideas that the AMD is putting forward to the Ports Regulator for consideration in order to jumpstart their own investigation into how rentals can be included in the methodology and should not be taken as an exhaustive list of options.

- The asset valuation in combination with the tariff strategy makes available the option to know exactly how much of the required revenue should be recovered from tenants based on the ‘user pays’ principle. It is therefore possible to determine a minimum requirement (Rands) per meter squared. This can be tiered in accordance with the nature of the land, for example, distance from the waters edge, assets, potential etc. Once the price per metre squared is determined, it can be published in the tariff book.
- Potential tenants can use this price as a base off which to put in proposals during the open tender process. In this way, TNPA will not be dictating the price to tenderers and demanding a rate that is based on their elusive ‘market valuations’. This also allows for tenderers to be able to compete on other terms such as investment and transformation.
- If the Ports Regulator is not happy with using the RAB and the Tariff Strategy as a way of determining base rentals, then they should publish a preferred methodology along with this tariff methodology review, which can also be renewed every three years.

- TNPA should not be allowed to retain any rental earned from land while it is being illegally leased. The forfeited money should come from their returns and not be pushed onto other port users.
- An instrument similar to that being utilised for WEGO could be used to incentivise and penalise efficient award of Section 56 leases.
- Section 56 leases up for renewal in the coming 3 years should be published in the tariff application. TNPA should also publish Section 56 agreements that have come to a close in the prior year, inclusive of the agreement reached, as is in line with UNCTAD recommended guidelines to promote transparency and reduce corruption.
- It is recommended that all leases are immediately amended to reflect an escalation tied to CPI (currently approximately 4.2%). If rental is meeting or superseding the required revenue placed on tenants through the asset valuation and tariff strategy (as it currently is according to TNPA's application), there is no reason for a real annual escalation, as this would just mean that tenants would increasingly subsidise the tariffs of cargo owners and shipping lines.
- It is of concern that the treatment of depreciated assets in use in the RAB valuation is going to have the unintended consequence of pushing up rental prices. This is more reason for the Regulator to more closely monitor rental price setting.
- In addition to the methodology related recommendations provided, it is requested that progress and details of 'discussions' with TNPA on leasing should be included in the upcoming Record of Decision. Furthermore, this investigation should be concluded rapidly.

The AMD also supports of the work that the Ports Regulator is doing to ensure that TNPA spend its CAPEX budgets, and to ensure that TNPA is corporatised because lack of maintenance occurs despite the fact that the Ports Regulator approves a capital and maintenance budget within the tariff approval process each year. Lack of maintenance and services is seriously impacting the business of tenants.

It is hoped that the Ports Regulator has gained a good understanding of the problems being faced by the shipbuilding and repair industry when it comes to lease terms and conditions being imposed by the TNPA. Where the recommendations in this report fall short, it is hoped that the Ports Regulator will consider new and better ways in which to address these problems.

# 1 Introduction

This submission is compiled by the Shipbuilding and Repair Committee of the South African Aerospace, Maritime and Defence Industries Association (AMD) in response to the Port Regulator's call for public comments on the review of the multi-year tariff methodology (2021/22 - 2024/25). This submission is grounded on the findings of a benchmarking study on port rentals conducted by the Committee in 2019, which is available [here](#).

## 1.1 The Aerospace, Maritime and Defence Industries Association<sup>3</sup>

The AMD's primary objectives are the representation of the aerospace, maritime and defence industries in matters of mutual interest, and the promotion of a profitable, sustainable and responsible industry. It comprises a cluster of leading companies in the South African private and public sector that supply defence material, products and services, including shipbuilding and repair companies. AMD assists and provides guidance in harnessing the collective effort of these industries, as these companies play a key role in the acquisition supply chain. As these industries are one of the cornerstones of a stable and growing South African economy, AMD is responsible for ensuring that a world-class, indigenous industry capability is maintained in a sustainable manner. Providing high-tech solutions at competitive prices is a constant requirement to secure export orders, which in turn leads to local skills development, job creation and retention. This submission was compiled by the Shipbuilding and Repair Committee of the AMD.

## 1.2 Motivation

The shipbuilding and repair industry is important to the economy of South Africa, as it is labour intensive, is less vulnerable to the trend of automation<sup>4</sup>, and has large potential for transformation. The industry holds a prominent role in South African policy, including being an essential element of Operation Phakisa<sup>5</sup>. Despite this, the industry has not yet been able to achieve the impact it could have, partly due to the lease conditions being imposed by TNPA on

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<sup>3</sup> <http://www.amd.org.za/about-us/company-profile>

<sup>4</sup> OECD, (2008). The interaction between the ship repair, ship conversion and shipbuilding industries. *C/WP6 (2008) 6*. From: <https://www.oecd.org/sti/ind/42033278.pdf>

<sup>5</sup> A South African national government action plan to unlock the economic potential of its oceans.

shipbuilding and repair companies. The lack of alternative land options for shipbuilding and repair activities, as the nature of their activities requires them to operate in ports, means that companies have little leverage to negotiate better lease terms. This is a vital point to consider when assessing this submission - rental of shipbuilding and repair infrastructure is not akin to open market principles and should not be treated as such.

It should be noted that industry players have been raising leasing issues with TNPA for several years. The Sheila Farrell and Associates study commissioned in 2014 by Transnet, the Department of Public Enterprises and the Department of Trade and Industry described lease challenges in detail<sup>6</sup>. Concerns over the non-transparency of lease valuation and rental price determination were raised by Trade and Industrial Policy Strategies (TIPS) in 2014<sup>7</sup>. Issues of rental and lease period were raised as key challenges coming out of the Operation Phakisa Lab in 2014<sup>8</sup>. Despite this, TNPA have taken no action to address the issues raised in previous studies. TNPA reported that they are currently working on revising leasing policy, however, they weren't willing to share details of this review process with the research team.

It is within this context of lack of action by TNPA over several years that has resulted in this appeal to the Ports Regulator to enforce improvements to lease terms using the tools at its disposal, the most effective of which is the Tariff Methodology. The AMD hopes that the Ports Regulator will seriously consider the facts of this submission in order to ensure better lease terms for the shipbuilding and repair industry, leading to increased development, transformation and the achievement of the policy objectives of South Africa, as enunciated in Operation Phakisa and other initiatives.

## 1.3 Approach

This submission will not deal with the fundamentals and detailed calculations of the tariff methodology as outlined in the call for submissions for two reasons:

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<sup>6</sup> Sheila Farrell Associates Ltd (2014) 'Development of a Ports Industry Investment Promotion Strategy'. Available on request from the dti.

<sup>7</sup> Trade and Industrial Policy Strategies (2014) 'Review of Regulation in the Ports Sector' Available: <http://www.tips.org.za/research-archive/trade-and-industry/economic-regulation/item/2768-review-of-regulation-in-the-ports-sector>

<sup>8</sup> Operation Phakisa (2014) 'Unlocking the Economic Potential of South Africa's Oceans' Available: <https://www.operationphakisa.gov.za/operations/oel/pmpg/Marine%20Protection%20and%20Governance%20Documents/Marine%20Protection%20and%20Governance%20Reports/OPOceans%20MPSG%20Final%20Lab%20Report%20OPT.pdf>

- Firstly, the AMD appreciates and respects the work that the Ports Regulator has done to date in determining the methodology and believes that the Regulator houses the necessary expertise to determine the best methodology for the country;
- Secondly, the AMD understands that the methodology, which determines the size of the 'cake' does not impact on the calculation of lease revenue which is the focus of this submission. The lease revenue, which forms the bulk of real estate income in the tariff application, is provided by TNPA, and this is subtracted from the 'cake' to determine marine tariff increases.

The approach to this submission, therefore, will be to focus on the manner in which the TNPA arrives at its real estate income, the manner in which this is dealt with by the Ports Regulator in the tariff approval process, and how this could be better dealt with in future using the tariff methodology.

### 1.4 Structure of the Report

This report is structured as follows:

- Chapter 2: Motivation for Rental Pricing Reform, which describes the current treatment of rental income within the methodology, how rental prices should be arrived at by TNPA and how they are actually being arrived at, and the results of an international benchmarking study on rental prices.
- Chapter 3: Recommendations, which describes potential options for inclusion of rental income within the tariff methodology,
- Chapter 4: Maintenance and Services, which describes the challenges being experienced by tenants with regard to maintenance and service delivery
- Chapter 5: Economic Impact, which describes the impact that the shipbuilding and repair industry is having on the economy and its potential.
- Chapter 6: Conclusion

## 2 Motivation for Rental Pricing Reform

### 2.1 Real Estate Revenue in the Tariff Methodology

Lease / rental prices are not included in the tariff book. Real estate income is provided by TNPA and is subtracted from the required revenue in order to determine the balance that needs to be recovered through marine revenue (which is in the tariff book). The table below shows how real estate income factors into the tariff application currently.

Table 1: Overview of NPA Tariff Application and Previous Decisions (R million as applicable)

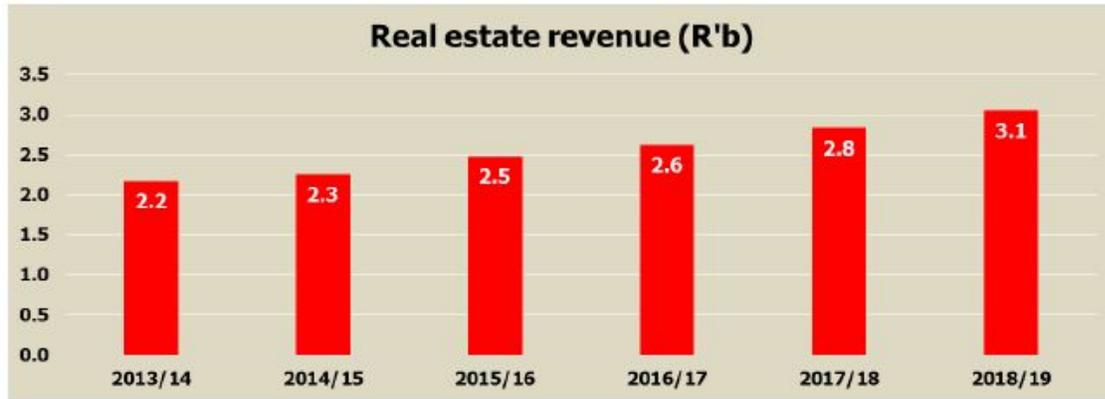
Overview of NPA Tariff Application and Previous Decisions (R million as applicable)					
WACC	Previous Year (18/19)		Current Tariff Application		
Year	Application	ROD	2019/20	2020/21	2021/22
Risk-Free Rate (nominal)	8.33%	8.35%	8.58%	8.53%	8.58%
Real Risk-Free rate	2.78%	3.46%	3.31%	3.41%	3.31%
MRP	5.30%	5.30%	5.30%	5.30%	5.30%
Asset Beta	0.50	0.50	0.50	0.50	0.50
Equity Beta (using Hamada)	0.86	0.86	0.86	0.86	0.86
Gearing	0.5	0.5	0.5	0.5	0.5
Debt/equity ratio	100%	100%	100%	100%	100%
Cost of Debt	10.79%	9.68%	10.78%	10.78%	10.78%
Inflation forecast	5.40%	5.40%	5.10%	5.00%	5.10%
Tax Rate	28.00%	15.80%	15.42%	15.42%	15.42%
Real Vanilla WACC	6.23%	6.38%	6.80%	6.90%	6.80%
Revenue Requirements Calculation					
Return on Asset	5 020	3 090	3 511	3 835	4 119
Depreciation	2 166	1 948	2 279	2 458	2 675
OPEX	5 938	5 938	6 291	6 853	7 446
Tax	1 150	682	640	699	751
Total	14 274	11 658	12 721	13 845	14 991
Claw-back	-1 531	-1 779	-1 353	-136	-
ETIMC	-81	345	-	-	-
Allowable Revenue	12 662	12 419	13 681	16 253	17 704
Y/Y growth	9.0%		10.16%	18.80%	8.93%
Real Estate	-3 025	-3 025	-3 284	-3 580	-3 849
Marine Business Income	9 637	9 394	10 398	12 673	13 854
Prior year's Revenue	8 469		9 706	10 398	12 673
Volume Increase	2.79%	3.05%	2.80%	2.80%	2.80%
Average Tariff Increase Required	8.45%	2.50%	4.21%	18.57%	6.34%

Source: Ports Regulator Record of Decision for the Tariff Year 2019/20

No further mention of real estate revenue is mentioned in the Record of Decision.

The latest tariff application (2020/21) contains the following information on real estate income.

Figure 3: Historical Real Estate Performance



The significant details of the Authority’s Real Estate portfolio are highlighted in Table 7 below.

Table 7: Real Estate Salient Features

Salient Features of Real Estate Business	FY 2019/20	FY 2020/21	FY 2021/22	FY 2022/23
	Current Tariff Year	Fixed Tariff Year	Projected Tariff Years	
Number of Ports	8	8	8	8
Gross Lettable Area	Approx 24 million sqm	Approx 24 million sqm	Approx 24 million sqm	Approx 24 million sqm
Number of Leases	683	683	683	683
Total No. of Terminal Operators	90	90	90	90
Vacancy Factor	6%	6%	6%	6%
Average term of Leases	5 - 25 Years	5 - 25 Years	5 - 25 Years	5 - 25 Years
Estimated Revenue (Current Financial Year)	R3 293 m	R3 548 m	R3 839 m	R4 132 m
Estimated Revenue (Subsequent Financial Year)	R3 548 m	R3 839 m	R4 132 m	R4 482 m
Forecast Revenue Growth	R255 m	R291 m	R293 m	R350 m

Source: TNPA Tariff Application for Financial Year 2020/21

No additional information is provided on how the above total revenue received is arrived at, however, TNPA does include the following statement:

“As stated in the Tariff Application ROD FY 2019/20, the Regulator requires more granular information relating to the Real Estate business of the Authority. In this regard, it is worth noting that discussions with the Regulator have commenced and are ongoing to ensure that the requirement is met” (TNPA, 2019, pp21).

It is our understanding that these discussions are focussed on ensuring that some leaseholders aren’t subsidising others (i.e. that there aren’t significant price differentials between

leaseholders), especially amongst terminal operators<sup>9</sup>. No definitive statement on the outcomes of this discussion are provided by the Ports Regulator in the Record of Decision from 2019/20, which suggests that these discussions aren't factoring into the tariff approval process.

Real estate income is further mentioned in the tariff application when discussing the tariff strategy. TNPA states that:

"The real estate revenue category contributes appropriately to the envisaged revenue contribution, in accordance with the tariff strategy".

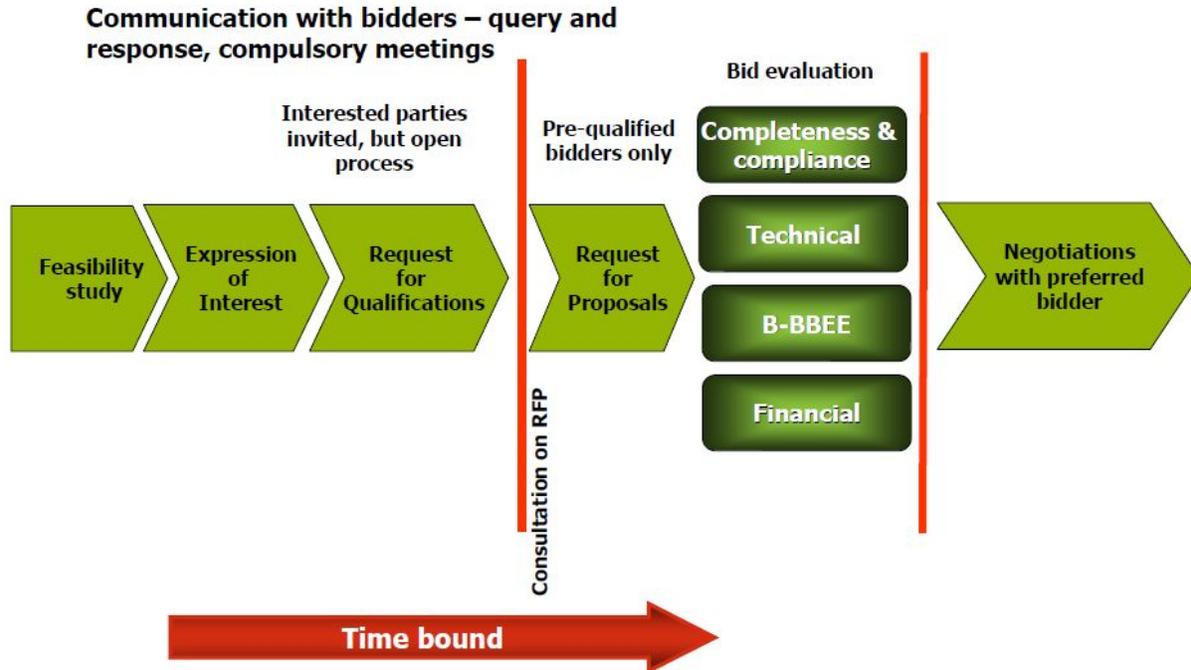
## 2.2 Determining Rental Prices

It is likely that the Ports Regulator is taking the real estate income at face value because of the sound process that is laid out in the National Ports Act to arrive at rental agreements. For ship building and repair facilities, lease agreements are incorporated as part of a section 56 agreement, as per the National Ports Act (see definitions for facilities, services, leases and section 56 agreements in Annexure 1). Ship repair is considered a service and requires a licence/permit. "In terms of s 57(1) of the Act, no person, other than the Authority, may provide a "port service" or operate a "port facility", unless an agreement has been concluded in terms of section 56 or a licence has been issued to such a person in terms of section 57 of the Act" (p10).

In terms of section 56(5), an agreement contemplated in section 56(1) may only be entered into by the Authority in accordance with "a procedure that is fair, equitable, transparent, competitive and cost-effective." The Authority will comply with these requirements in the manner described below, where the procedure is summarised as follows (p31):

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<sup>9</sup> Ports Regulator of South Africa (2019) 'Annual Performance Plan for the fiscal year 2019/2020' Pg. 22 Available: [https://www.portsregulator.org/doc/Ports-Regulator-Annual-Performance-Plan-2019\\_20.pdf](https://www.portsregulator.org/doc/Ports-Regulator-Annual-Performance-Plan-2019_20.pdf)



Source: TNPA Guidelines (2008), p31<sup>10</sup>

“The Authority will not necessarily advertise its intention to enter into a section 56 agreement in the Government Gazette, but will do so in the media and at venues and through industry associations aimed at soliciting the best possible response. As far as terminal operations are concerned, the Authority may, for larger facilities, advertise internationally” (p33).

It should be noted that no specific lease terms regarding valuations, escalations and the lease period are laid out in the National Ports Act, nor are they included in TNPA’s Guidelines for Agreements, Licences and Permits<sup>11</sup>.

If the legal process as set out in the Act and the Guidelines is followed (i.e. open tender), then the highest bidder that meets the compliance, B-BBEE and technical requirements will be selected and that will reflect what the market is willing to pay. This process is in line with UNCTAD published best practice<sup>12</sup>.

<sup>10</sup> Ibid.

<sup>11</sup> Transnet National Ports Authority (2008) ‘Guidelines for Agreements, Licences and Permits in terms of the National Ports Act No. 12 of 2005’ Available: <https://www.transnetnationalportsauthority.net/Legal,%20Risk%20and%20Compliance/NationalPortAct/Pages/Port-Legal-Framework.aspx>

<sup>12</sup> UNCTAD (1998) Available: <https://unctad.org/en/Docs/posdtetibd1.pdf>

A second reason for the Ports Regulator to take real estate income at face value is that the nature of the tariff methodology means that TNPA does not have an incentive to push up lease prices beyond what the market is willing to pay. This is because TNPA's revenue is a zero sum game, so any increases in rental prices will just result in a decrease in tariffs for the two other ports users, namely, cargo owners and shipping lines (and no increase in overall revenue for TNPA). While this may be true, this is not the experience of tenants who have borne the brunt of rent seeking behaviour by TNPA.

While both the legal process which is line with international best practice and the fact that the overall cost to port users in unaffected by rental increases are valid reasons for the Ports Regulator to accept real estate income from TNPA, the reality on the ground is that the legal process is not being adequately followed, and the approach of TNPA does not reflect an understanding that rent-seeking behaviour is unjustified. The latter is reflected in the "five key pillars of the Real Estate Strategy" reported on within TNPA's latest tariff application - the first of which is "revenue growth".

## 2.3 Reality of Shipbuilding and Repair Tenants

Challenges with TNPA-issued leases in the shipbuilding and repair industry have been raised for several years. In 2014, the Department of Trade and Industry issued a study to identify challenges within the shipbuilding and repair industry and formulate a strategy on how to address these challenges and grow the industry<sup>13</sup>. The study identified land leasing policy and rental prices as one of the key challenges. A recent study conducted by the AMD on rental agreements, confirmed and expanded on these findings. The study included surveys and interviews with ship and boat building and repair companies, as well as an international benchmarking exercise. Specific challenges with the lease terms and conditions identified by industry in the AMD study are described below.

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<sup>13</sup> Farrell, S. (2014). *Ports Industry Investment Promotion Strategy*. From: <https://www.transnetnationalportsauthority.net/TNPA%20Publicity/Marine%20Industrial%20Engineering%20Workshop%20Presentatio/Sheila%20Farrell%20presentation%20part%201%2014%20april%202014.pdf>

### 2.3.1 Lease Period and Section 56 Processes

8 shipbuilding and repair leases reviewed were 5-year leases or less. Only 1 historic lease was longer than 5 years.

- One of these 8 leases was awarded as part of a recent open tender process (section 56 agreement<sup>14</sup>) as part of a contract to build a single vessel which was expected to take up to 5 years,
- One of these was a 3-year lease provided in order to avoid having to go through tedious Section 56 approval processes,
- Two of these went through the section 56 process on multiple occasions but had not been awarded a long-term lease or licence as yet and had not received any feedback from TNPA as to why they were unsuccessful,
- Two of these were placed on a month to month lease or other short extensions due to delays in the section 56 process,
- One of these was a lease that had already expired and one of these the process by which the lease was awarded was unable to be determined.

Short and unstable lease terms are a disincentive for investment and limit the type and size of orders that a shipbuilder can plan for. Due to the short rental period, tenants have to depreciate their, often significant, investments over fewer years than what they would ordinarily, which increases costs. Three tenants shared their annual depreciation as a percentage of their fixed annual costs, which were 11-15%, 21-25% and more than 35%. In addition, businesses noted the following challenges.

- Most tenants and non-tenants reported that the TNPA tender process is unclear and non-transparent. One current tenant noted that they made applications to continue their lease as part of the open tender process, however, they were rejected and the tender was re-advertised three times, with no communication as to why the current tenant was unsuccessful.
- Tender processes are inefficient, resulting in ad-hoc extensions (which are illegal) and lost investment opportunities.

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<sup>14</sup> A section 56 agreement refers to Section 56 of the National Ports Act and describes an open tender process for the award of leases and licences for shipbuilding and repair facilities and services. See Annexure 1 for a detailed definition.

- Some companies state that they miss opportunities to tender due to poor advertisement and lack of communication.
- Companies report that the broad-based black economic empowerment (B-BBEE) requirements are not clear - a tenant reported that they were told they needed to be level 1 and then this changed to up to level 4 in the space of a year, resulting in lost investment. Neither TNPA or Transnet has a publicly available B-BBEE policy or guidelines. From perusing Transnet's request for proposals, it is assumed that TNPA complies with the 2017 Preferential Procurement Requirements<sup>15</sup>. The requirements provide for a points system based on price and B-BBEE score and allow for the RFQ to stipulate a minimum requirement for B-BBEE. TNPA is legally allowed to place stringent requirements on lease applications, however, this must be advertised within the RFQ. It is the experience of tenants that only the preferential points system is stipulated within the RFQs and not the minimum requirement, yet tenants are being rejected on that basis. Furthermore, it is reported by tenants that these requirements are verbally shared with tenants, as opposed to within a formal document.
- The largest complaint reported by most industry players is the unwillingness of TNPA to negotiate lease terms and conditions in good faith. According to industry, TNPA has a 'take it or leave it' approach and are unsympathetic even in instances when companies have had to go insolvent. Companies report that there is no engagement or transparency. This is a symptom of the fact that TNPA is a monopoly landlord in the South African port system which leaves tenants with little bargaining power. The lack of a publicly accessible archive of open calls and the results thereof means that no data exists to shed further light on these issues.

### 2.3.2 Rental price

The rental price is considered by the industry to be very high and, while TNPA claims that the rental is based on market prices, the price determinant is not stipulated in the lease or in any other guideline or document.

Of those who responded to the electronic survey, 2 tenants reported that TNPA has market valuations done but these aren't shared with the tenants, 2 tenants reported that they don't

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<sup>15</sup> Department of Trade and Industry (2017) Available:  
[https://www.thedti.gov.za/economic\\_empowerment/docs/PPPFA%20Regulation.pdf](https://www.thedti.gov.za/economic_empowerment/docs/PPPFA%20Regulation.pdf)

know how rental is determined, and 1 tenant reported that the price was determined via open tender. Only 1 tenant reported that there is room for negotiation on rental price. Four tenants shared their rental costs as a percentage of their fixed annual costs, which were 6-10%, 11-15%, 31-35% and over 35%.

Some industry players argue that the method used by TNPA to conduct valuations is incorrect as it compares land to that in general industrial areas outside of the port, as opposed to shipbuilding and repair comparisons or even land prices within special economic zones situated alongside ports and more suited to the economic development mandate of the port. In some cases (seemingly ad hoc), TNPA have allowed tenants to appoint their own valuers but the outcome of this is still to be determined or considered confidential. One shipbuilder's experience was that TNPA encouraged them to appoint an independent professional valuer whose report was shared with TNPA, however TNPA refused to consider the report and its recommendations, instead they appointed their own valuer but refused to share the report and discuss it openly. They also refused to share the offering by competitors who submitted bids for the property after advertising it three times.

Legally, the 'market rental' should be determined via competitive open tender process and not stipulated by TNPA. One tenant reported that the rental was determined via the section 56 process but that they understood verbally from Transnet that they were to apply with a certain rental amount (as stipulated by TNPA) otherwise they would not get the lease, which the tenant could not afford to lose. There is also a 'negotiation' period within the TNPA Guidelines but this is not consistently applied. No part of the process is publicly available or published, not even after award, which would have been useful for understanding lease awards for the shipbuilding and repair industry in the context of all leases within the ports.

In addition to the above, tenants are plagued by the improvements clause within lease agreements. The lessee may not remove any improvements to the site made by the lessee unless authorised by TNPA and TNPA will not compensate the lessee for the value of improvements. Furthermore, should the lessee renew the rental agreement then the rental payable will be the market rental for the site, including any value attributable to the improvements. The reason that the lease terms and conditions tied to improvements are particularly problematic in South Africa is because lease periods are only 5 years, which allows no time to recover investment, and the fact that rentals are determined by the landlord

according to a valuation that assumes the land and its assets are A-grade, when in fact they are poorly maintained and in some instances uninhabitable, requiring enormous and unfair investment by tenants

### 2.3.3 Escalations

Escalations are set at 9% annually, which is compounded over 4 years (just over 50% in total). In addition, at the end of the 5-year lease term or on an ad hoc basis (lease dependent), TNPA is allowed to readjust the lease price based on an updated valuation of the land. The methodology for arriving at 9% is not stipulated in the lease agreement. One tenant reported that they prefer shorter leases because the 9% annual increase over more than 3 years would result in a far greater increase than revaluing the land. Other tenants fear that re-evaluations would result in a far greater increase than 9%, especially if improvements have been made to the site or surrounding sites.

In sum, the leases and interviews of shipbuilding and repair companies show that the Section 56 process that aims to provide “a procedure that is fair, equitable, transparent, competitive and cost-effective” is not materialising and this is to the detriment of the industry.

## 2.4 International Benchmarking

In order to understand the experience of local shipbuilding and repair companies in context, an international benchmarking study was undertaken. The full details of the benchmarking study, including source documents can be found [here](#). A summary of the results follows.

- **TNPA lease period of 5 years is significantly less than international lease periods**, which are between 15 and 30 years. UNCTAD recommends a lease period of between 10 and 25 years, dependent on investment amount. Once the lease is signed, UNCTAD recommends that the lease terms are announced publicly in order to increase transparency.
- **TNPA price per m2 is on the higher side of the ports who published rates**, however, this figure should be read with caution due to the fact that leases are for different parts of the port, have different infrastructure on the land, were established in different years

(inflation has not been taken into account, and the current conversion rate was used), and are in different currencies.

- More important is the method used to determine rental prices. For most international agreements, rental determinants were published within the lease or the lease policy. **TNPA's methodology is not published within the lease but their 'Guidelines for Agreements, Licences and Permits'<sup>16</sup>, describes an open tender process where the bidder that meets all criteria, while having the best financial proposition is awarded the agreement.** Methods used to determine rental varied between the ports:
  - 10% of the land acquisition cost [1 port]
  - Market prices [4 ports]
  - Highest bidder in an open tender process [UNCTAD guidelines]
  - Rent capping mechanism imposed by regulator [1 port]
  - Market price excludes any structures i.e. is determined for vacant land only [1 port]
  - Rental price based on the business potential at the port where the authority takes an annual fee and profit share [1 point]
- **Improvements:** It is not uncommon internationally for the landlord to take possession of the improvements at the end of the lease term without compensation. Four of the 8 ports referred to improvements. In all cases the port takes ownership of improvements, similar to TNPA, however, 1 port references purchasing improvements and 1 port references the fact that improvements cannot be included in determining rental price. Three ports speak to a predetermined arrangement where a plan for capital investment is put into place on negotiation of the lease terms by the two parties to the benefit of both parties
- Escalations varied amongst the 6 ports, however, **all ports escalated at a lower rate than TNPA's 9% annual escalation** (note: CPI fluctuates around the 5% mark in South Africa). Port escalations are as follows:
  - 3% annually [2 ports]
  - Annual escalation according to the consumer price index [3 ports]

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<sup>16</sup> Transnet National Ports Authority (2008) 'Guidelines for Agreements, Licences and Permits in terms of the National Ports Act No. 12 of 2005' Available: <https://www.transnetnationalportsauthority.net/Legal,%20Risk%20and%20Compliance/NationalPortAct/Pages/Port-Legal-Framework.aspx>

- No annual escalation [2 ports]
- Predetermined escalations written into lease [1 port]
- Resets no less than 5 years [3 ports]
- Reset/re-adjustment cap imposed [2 ports]

It is the opinion of the AMD that the above-described experience of numerous shipbuilding and repair (including some boatbuilding and repair) tenants and businesses, in tandem with the international benchmarking study, proves that there is a problem with the way that TNPA is setting lease terms, especially regarding pricing. Furthermore, it is our understanding that this problem falls within the mandate of the Ports Regulator, which is to ensure that the TNPA is complying with its statutory functions, specifically that the TNPA is ensuring that affordable port services/ facilities are provided (S11(1)(h)), that the TNPA is promoting the economy on the part of licenced operators in accordance with recognised international standards and public demand (s11(1)(k)), that TNPA is promoting equality (s11(1)(l)), and that TNPA is advising on all matters relating to the port sector, port services and port facilities (s11(1)(q)). Therefore, the following recommendations are provided.

### 3 Recommendations

It is the view of the AMD that the tariff approval process is currently the most effective and entrenched means to influence the behaviour of TNPA, and guide them towards proper implementation of the National Ports Act. This is also the most objective avenue and it avoids retaliatory action by the TNPA on individual port users.

In 2014, Sheila Farell and Associates conducted a study on behalf of the dti and Transnet and recommended that:

“A more transparent, and probably different, approach to the calculation of rents, which places more weight on the impact of rents on the competitiveness of South African industries, and on the contribution which they make to the South African economy. Port-related industries are captive, non-core businesses which are at risk of bearing more than their fair share of future rent increases. We therefore suggest that the dti

negotiates with TNPA policy guidelines for the determination of their rents. *Alternatively, the scope of the Ports Regulator could be extended to include rents as well as tariffs*".

This is quoted here to show that the desire of industry and recommendation from researchers has been that the Ports Regulator take a closer look at rentals for at least the previous 5 years. While finding the correct mechanism to approach this within the tariff methodology is difficult, the Ports Regulator has an obligation to earnestly consider ways in which this can be done. The following recommendations are ideas that the AMD is putting forward to the Ports Regulator for consideration in order to jumpstart their own investigation into how rentals can be included in the methodology and should not be taken as an exhaustive list of options.

### 3.1 PRSA Mandate for Rental Price Setting

It is important to note that there is provision in the National Ports Act (sections 72 and 73) for rentals to be approved by the Ports Regulator, as rentals are not treated any differently in the Act than are port dues, cargo dues and berth dues, which are included in the Tariff Book. Sections 72 and 73 are included below.

Section 72	<p>Authority's tariff book.</p> <p>(1) (a) The Authority must, with the approval of the Ports Regulator, determine tariffs for services and facilities offered by the Authority and annually publish a tariff book containing those tariffs.</p> <p>(b) The Authority may, with the approval of the Ports Regulator, amend the tariff book whenever it is necessary to do so.</p> <p>(2) The Authority must, prior to any substantial alteration of a tariff, consult with the National Port Consultative Committee.</p> <p>(3) Subject to section 9 of the Competition Act, 1998 (Act No. 89 of 1998), the tariffs contemplated in subsection (1) may vary between ports.</p> <p>(4) Notwithstanding the provisions of this section, the Authority may enter into an agreement with a licenced operator or a party to an agreement or a port user for the variation of any tariff contemplated in subsection (1).</p>
Section 73(1)(b)	<p>73. (1) The Authority may charge fees, in accordance with a tariff determined in terms of section 72, for-</p> <p>(b) the provision and maintenance of port infrastructure, port terminals and port facilities, including-</p> <p>(i) land rentals;</p>

	<p>(ii) port dues for the provision and maintenance of entrance channels, breakwaters, basins, navigational aids and maintenance dredging inside port limits;</p> <p>(iii) cargo dues for the provision and maintenance of port infrastructure-</p> <p>(iv) berth dues for vessels occupying quays or repair quays while not engaging in the loading or unloading of cargo;</p>
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## 3.2 Rental Price Setting Recommendations

Currently, TNPA is dictating the rental price to shipbuilding and repair bidders based on an unknown market valuation methodology and claiming that this rental is the market price, which fundamentally it cannot be, given the process prescribed by the National Ports Act, where bidders determine the market price in an open tender process. This current process is unfair, unchecked and inefficient and must stop. It is therefore recommended that rentals are determined through the correct implementation of the open tender process, where the rental price is determined by the market, not through TNPA's untested and unclear valuation process. Alternatively, or in combination with the open tender process, it is recommended that Section 73(1)(b)(i)<sup>17</sup> of the Act be utilised to include land rentals within the tariff book/ Regulator approval process. These are described in more detail below.

- According to the benchmarking study, the determination of rental prices is varied amongst international leases; however, the majority of leases stipulate that rentals reflect market prices. Furthermore, international best practice recommends that rentals are determined through an open tender process. A properly managed section 56 process should arrive at the market price, i.e. the highest bidder who meets the technical, B-BBEE and compliance requirements, should be awarded the lease. This process should be transparent and professional.
- The asset valuation in combination with the tariff strategy makes available the option to know exactly how much of the required revenue should be recovered from tenants based on the 'user pays' principle. It is therefore possible to determine a minimum requirement (Rands) per meter squared. This can be tiered in accordance with the

<sup>17</sup> "73. (1) The Authority may charge fees, in accordance with a tariff determined in terms of section 72, for- (b) the provision and maintenance of port infrastructure, port terminals and port facilities, including- (i) land rentals".

See full description in Annexure 1.

nature of the land, for example, distance from the waters edge, assets, potential, etc. Once the price per metre squared is determined, it can be published in the tariff book.

- Potential tenants can use this price as a base off which to put in proposals during the open tender process. In this way, TNPA will not be dictating the price to tenderers and demanding a rate that is based on their elusive ‘market valuations’. This also allows for tenderers to be able to compete on other terms such as investment and transformation.
- If the Ports Regulator is not happy with using the RAB and the Tariff Strategy as a way of determining base rentals, then they should publish a preferred methodology along with this tariff methodology review, which can also be renewed every three years. This will avoid the current legal arguments being entered into between TNPA and tenants and causing port users’ money to be wasted on legal fees.

When considering the rental methodology, the Ports Regulator should consider that there is international precedent for different types of rental structures. Currently, TNPA works according to a flat rate, however, options perhaps more suited to the volatile shipbuilding and repair industry are: (a) to impose minimum and maximum rental caps that fluctuate according to the state of the market, and (b) a profit-sharing model. It could be argued that TNPA, being a state-owned-entity, is already profit sharing with tenants as the state receives taxes based on profit, however, tenants are not treated in this regard. These options would benefit the whole industry, but would especially benefit new market entrants through lowering risk.

### 3.3 Section 56 Checks and Balances

A major challenge presented by industry is the non-transparent and uncommunicative way in which TNPA handles Section 56 processes. The inefficiency of TNPA in handling these processes leads to short-term leases and instability within the ports system, with dire consequences for industry and investment. The National Ports Act makes no provision for month-to-month (or any short-term) extensions. According to legal advice provided to the AMD, these extensions are illegal. They are also bad for economic growth and transformation. As a way to stop this from happening, it is recommended that:

- TNPA is not allowed to retain any rental earned from land while it is being illegally leased. The forfeited money should come from their returns and not be pushed onto other port users.

- An instrument similar to that being utilised for WEGO could be used to incentivise and penalise efficient award of Section 56 leases.
- Section 56 leases up for renewal in the coming 3 years should be published in the tariff application. This should alert TNPA to action that needs to take place three years in advance of the lease termination to ensure no extensions. TNPA should also publish Section 56 agreements that have come to a close in the prior year, inclusive of the agreement reached, as is in line with UNCTAD recommended guidelines to promote transparency and reduce corruption. This publishing of awarded contract and price is very common for government administered open tender processes.

### 3.4 Escalations

It is recommended that all leases are immediately amended to reflect an escalation tied to CPI (currently approximately 4.2%). TNPA's current 9% escalation is internationally unprecedented and unfair as it is imposed on tenants without negotiation (even new market entrants and SMMEs). In fact, several leases in the benchmarking study experience escalations of less than CPI, including ports that have no annual escalation at all. There is no reason why this amendment needs to wait for a new agreement to be entered into, and can be administered across all tenants, reducing risk of complaints.

If rental is meeting or superseding the required revenue placed on tenants through the asset valuation and tariff strategy (as it currently is according to TNPA's application), there is no reason for a real annual escalation, as this would just mean that tenants would increasingly subsidise the tariffs of cargo owners and shipping lines. The inflation rate that is used as part of the tariff approval process should be published in the record of decision and applied to leases annually, or at least every 5 years. Furthermore, it is recommended that TNPA is not allowed to increase the rental based on improvements that the tenant has themselves invested as this is fundamentally against the valuation methodology, i.e. assets that TNPA have not themselves built, do not need to be depreciated and do not need to be recovered and should therefore have a R0 value.

## 3.5 Unintended Consequences of the RAB Valuation

It is of concern that the treatment of depreciated assets in use in the RAB valuation is going to have the unintended consequence of pushing up rental prices. The RAB valuation states that existing assets that are fully depreciated will be assigned the value of the lease. Previously, the 'size of the cake' as determined by the tariff methodology did not take rentals into account. In the case of the shipbuilding and repair industry, tenants invest in assets themselves, therefore assets will be fully depreciated once TNPA takes ownership. By including rentals into the value of the RAB, a motivation to increase rentals is introduced because the higher the rental the more the RAB will be and the higher the revenue allowed will be. This is more reason for the Regulator to more closely monitor rental price setting.

## 3.6 Other Recommendations

In addition to the methodology related recommendations provided, it is requested that progress and details of 'discussions' with TNPA on leasing should be included in the upcoming Record of Decision. Furthermore, this investigation should be concluded rapidly. The burden should be on TNPA to provide the capacity necessary to develop a database of leases in an efficient and organised manner, to quickly highlight instances of cross-subsidisation, and propose a plan to correct such. After all, port users are the ones providing the resources for this capacity and the ones bearing the brunt of the lease inconsistencies. This plan should then be published as part of the tariff application as it is directly relevant to the tariff approval process and all port users deserve to know the extent of the issue and the timelines within which this should be addressed.

## 4 Maintenance and Services Challenges

The AMD is focussing on the use of the methodology to further scrutinise the 'real estate' line item being provided by TNPA in this submission. However, the AMD would also like to raise the following challenges in support of the work that the Ports Regulator is doing to ensure that TNPA spend its CAPEX budgets, and to ensure that TNPA is corporatised. TNPA is responsible for all structural maintenance and maintenance of common areas surrounding the site, quay and water areas, however, according to industry players, TNPA does not always conduct this maintenance and the cost is incurred by the tenant. Lack of maintenance occurs despite the fact

that the Ports Regulator approves a capital and maintenance budget within the tariff approval process each year, which means that TNPA does have the budget to conduct these repairs.

It is a function of TNPA, as port landlord, in accordance with section 11(1)(a) of the Act to maintain and improve port infrastructure, however, this is not being done. Two tenants reported that buildings were inhabitable when taking possession of the lease, with no certificates of compliance (their understanding was that these would be issued but TNPA has not followed through on this commitment). In one case a condemned building had to be torn down and rebuilt (a R12m investment), in another case significant capital had to be put in to make the building safe for occupancy. A third tenant reported that they tiled and painted their building interior. No compensation was provided by TNPA for these improvements.

In addition to leaseholders interviewed, 5 out of 6 tenants who responded to the electronic survey said that TNPA does not adequately perform maintenance (or performs no maintenance at all). Examples provided included that docking slots are uncertain due to broken pumps or caissons, dredging does not occur, ablutions are non-functional, and access and drainage are long-standing problems. An interviewee reported that they had to pay for the use of mobile cranes while TNPA's dockside cranes weren't working. Another interviewee said that part of their lease is unusable due to silting caused by lack of maintenance, yet they still have to pay for this land. Like other lease challenges, the tenant has little to no mechanism within the lease to object to or seek compensation for maintenance not being done.

All leaseholders interviewed and surveyed stated that TNPA does not adequately provide services needed to conduct ship and boat building and repair. Booking docking slots is difficult due to lack of capacity (often due to poor maintenance) and companies make ghost bookings just to ensure that they get some access even if it may not be required. Bunkering services are poor, forcing some companies to go to Walvis Bay rather than local ports. Towing services are not available, and companies must wait for weeks to have vessels towed from the Waterfront to the basin.

## 5 Economic Impact

The maritime/oceans economy, including the shipbuilding and repair industry, is essential to the growth strategy of South Africa, and is being elevated in the most important policy and strategic

government documents. This chapter describes the negative economic impact that the current lease terms and conditions are having on the shipbuilding and repair industry, and will continue to have, if the Ports Regulator is not able to assist through amending the tariff methodology.

### Summary of industry statistics

**Employment:** 4,600 direct, 18,400+ indirect (StatsSA 2018, multiplier of 4)

**GDP:** 0.2% of manufacturing production value (dti, 2018)

**Investments:** R6.9bn (dti, 2018)

**Number of businesses:** 75 direct, 200 in extensive supply chain (Sheila Farrell, 2014, dti, 2018)

**Total revenue:** R6bn (Sheila Farrell, 2014)

**Exports:** 80%-90% of production (dti, 2018)

**Export value:** R2.2bn (0.2% total exports) (dti, 2018)

**Number of vessels entering ports for repairs:** 287 (Operation Phakisa, 2012)

The Operation Phakisa Lab (2014)<sup>18</sup> released the following targets for the maritime engineering industry for 2033.

2033 Targets	GDP Contribution	Jobs
Repair and refurbishment	R15bn	15,000
Boat building	R4bn	3,000
Ship and offshore vessel construction	R2bn	3,000
Marine equipment manufacturing	R1bn	1,000

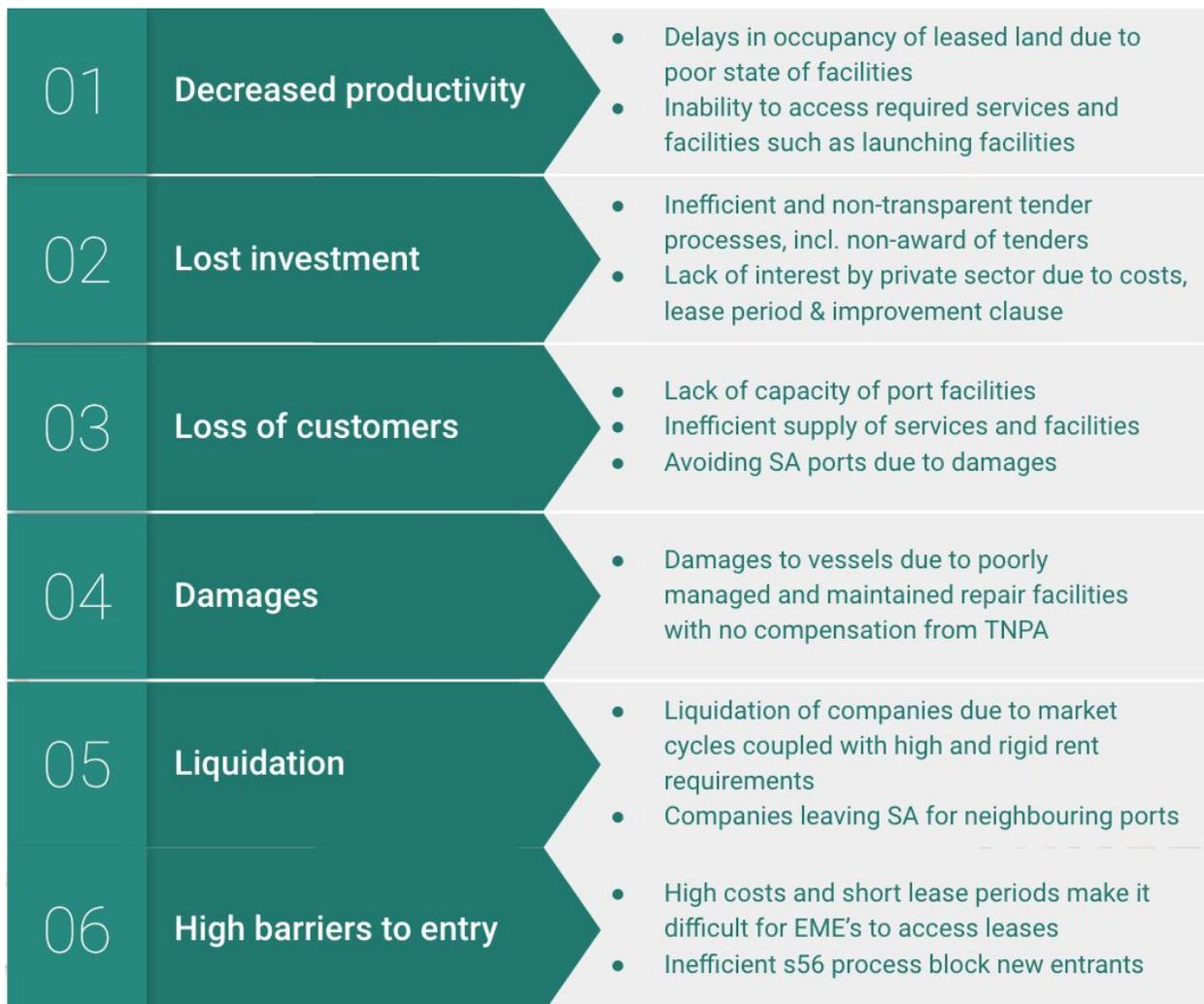
Source: Operation Phakisa Lab (2014)

The shipbuilding and repair industry is labour intensive, has a large employment multiplier, has a large local manufacturing supplier base, and is a large exporter, therefore, has the ability to significantly contribute to the Operation Phakisa targets for the ocean economy. This is evidenced by the following.

<sup>18</sup> Operation Phakisa Lab (2014). *Unlocking the Economic Potential of South Africa's Oceans*. From: <https://www.operationphakisa.gov.za/operations/oel/pmpg/Marine%20Protection%20and%20Govenance%20Documents/Marine%20Protection%20and%20Govenance/OPOceans%20MPSG%20Executive%20Summary.pdf>

- SA is capturing less than a quarter of the potential repairs market (excl. Oil rigs) (SF, 2014)
- There is potential for an increase in revenue for repairers of R15bn (SF, 2014)
- There is potential to capture 10 - 15 commercial builds per annum (SF, 2014)

However, the restrictive lease terms and conditions, poor maintenance and lack of capacity for expansion negatively impacts the shipbuilding and repair industry. The following negative impacts were reported through stakeholder engagement.



Many specific examples of the above impacts were referenced by stakeholders, including instances where even state financing bodies wouldn't finance developments based on lease terms and conditions. Boating South Africa noted that the problems described above are industry-wide problems. In order to aid the boatbuilding industry with issues of access, an

industry association was formed and took up a lease at Elliot Basin in the Port of Cape Town for use of the jetty. Due to the economic downturn, boatbuilders weren't able to keep up with rental, especially due to escalations, and the association was liquidated.

SFAL noted in 2014 that *"This is a tight schedule, but if TNPA does not act promptly, there is a risk of South Africa losing its pole position within Sub-Saharan Africa, with investment gradually drifting away to neighbouring countries"*. It is now 2019, the schedule is much tighter and the risk more real, as large industry players are considering other African ports and productivity is undoubtedly reduced for various TNPA led reasons. Furthermore, South Africa is in a far worse economic position than it was in 2014, experiencing recessions in GDP and employment. South Africa cannot afford further job losses and cannot continue to hold back an industry with such proven potential for growth.

## 6 Conclusion

It is hoped that the Ports Regulator has gained a good understanding of the problems being faced by the shipbuilding and repair industry when it comes to lease terms and conditions being imposed by the TNPA. Mainly, that lease prices, including escalations, are unfairly arrived at in a manner that is not in line with the National Ports Act and not clear to tenants. Where the recommendations in this report fall short, it is hoped that the Ports Regulator will consider new and better ways in which to address these problems. This submission was conducted solely on the experience of shipbuilders and repairers but certain aspects are likely to be replicated across tenants, which should be investigated. Furthermore, it is hoped that the Ports Regulator is now aware of the large negative impact that these terms are having on the shipbuilding and repair industry and therefore the economy of South Africa.

If TNPA changed its approach to businesses within the shipbuilding and repair industry, there would be no need for such a request for the Ports Regulator to inflict regulations in this regard. The best lease terms and conditions would be arrived at through a common willingness to grow business and create jobs. This change in TNPA's approach towards industry is the most critical change required and the greatest plea from the shipbuilding and repair industry. However, until this is achieved it is requested that the Ports Regulator intervene urgently through the tools available in the tariff methodology. It is likely that introducing some transparency in the process

will begin to repair the adversarial relationship that the shipbuilding and repair industry finds itself in with TNPA.

For more information on the lease terms and conditions of the shipbuilding and repair industry in South Africa, including detailed benchmarking, policy review, economic impact and broad recommendations, please see [this report](#), which was completed by the AMD in August 2019.

# Annexure 1

<p><b>Lease agreements</b></p>	<p>Lease agreements are not section 56 agreements (even though a lease may form part of a section 56(1) agreement). A lease agreement is a form of contract entered into between parties, where the parties agree that the landlord gives the use and enjoyment of the landlord's immovable property to the other party in return for payment of rent, for a certain period and both parties agree to comply with the general principles of contract and rules specific to the lease agreements (TNPA Guidelines, 2008, p6-8).</p>
<p><b>Section 56(1) agreements</b></p>	<p>Section 56(1) are agreements entered into principally for the operation of a port terminal or a port facility, in terms of section 56(1). These agreements will in most instances include the lease of land and infrastructure and the right to operate the relevant port terminal or port facility, but are distinguished from lease agreements in the Guidelines (TNPA Guidelines, 2008, p6-8).</p> <p>Agreements in port operations and services</p> <p>(1) The Authority may enter into an agreement with any person in terms of which that person, for the period and in accordance with the terms and conditions of the agreement, is authorised to-</p> <p>(a) design, construct, rehabilitate, develop, finance, maintain or operate a port terminal or port facility, or provide services relating thereto;</p> <p>(b) provide any other service within a port designated by the Authority for this purpose;</p> <p>(c) perform any function necessary or ancillary to the matters referred to in paragraphs (a) and (b); or</p> <p>(d) perform any combination of the functions referred to in paragraphs (a), (b) and (c).</p> <p>(2) An agreement concluded in terms of this section must provide for the Authority to monitor and annually review performance with regard to the operation of the terminal or facility and the provision of the relevant services in terms of a performance standard specified in the agreement.</p> <p>(3) The services authorised under the agreement contemplated in subsection (1) may include stevedoring on board a vessel.</p> <p>(4) Notwithstanding any other provision of this Act, the Authority may enter into agreements in terms of which it contracts out any service which the Authority is required to provide in terms of this Act.</p> <p>(5) An agreement contemplated in subsection (1) or (4) may only be entered into by the Authority in accordance with a procedure that is <i>fair, equitable, transparent, competitive and cost-effective</i>. (National Ports Act, 2005)</p>

<p><b>Port facilities</b></p>	<p>Port facilities are not defined in the Act; are defined within the TNPA Guidelines (2008) as port terminals and <i>port repair facilities such as dry docks and vessel repair facilities</i> within a port, as well as terminal infrastructure, rail sidings and infrastructure, cargo-handling equipment, sheds and other land-based structures used for the loading, storage, transshipment and discharging of cargo or the embarkation and disembarkation of passengers (TNPA Guidelines, 2008, p6-8).</p>
<p><b>Port services</b></p>	<p>Port services are those defined in s 1, being: stevedoring, cargo handling, terminal operations, storage of cargo within a port, tug services, floating crane services, berthing services, firefighting, security, radio and radar services, waste disposal, <i>vessel repairs</i> and any other services provided within a port which are designated as such by the Authority by notice in the Gazette (TNPA Guidelines, 2008, p6-8).</p>
<p><b>Preferential Procurement Regulations</b></p>	<p>As of 20 January 2017, the amended Preferential Procurement Regulations have been gazetted by National Treasury. Effective date of the Regulations is 01 April 2017</p> <p><b>Key Amendments:</b></p> <ul style="list-style-type: none"> <li>● 80/20 preference point system from R30 000 and up to R50 million</li> <li>● 90/10 preference point system above R50 million</li> <li>● Certain concepts and definitions have been aligned to the B-BBEE Act No 46 of 2013</li> <li>● If an organ of state decides to apply pre-qualifying criteria to advance certain designated groups, that organ of state must advertise the tender with a specific tendering condition that only one or more of the following tenderers may respond-             <ul style="list-style-type: none"> <li>○ a tenderer having a stipulated minimum B-BBEE status level of contributor;</li> <li>○ an Exempted Micro Enterprise (EME) or Qualifying Small Enterprise (QSE);</li> <li>○ a tenderer subcontracting a minimum of 30% to-                 <ul style="list-style-type: none"> <li>■ an EME or QSE which is at least 51% owned by black people;</li> <li>■ an EME or QSE which is at least 51% owned by black people who are youth;</li> <li>■ an EME or QSE which is at least 51% owned by black people who are women;</li> <li>■ an EME or QSE which is at least 51% owned by black people with disabilities;</li> <li>■ an EME or QSE which is 51% owned by black people living in rural or underdeveloped areas or townships;</li> <li>■ a cooperative which is at least 51% owned by black people;</li> <li>■ an EME or QSE which is at least 51% owned by black people who are military veterans;</li> </ul> </li> </ul> </li> </ul>

The Broad-Based Black Economic Empowerment Act No 53 of 2003 as Amended by Act 46 of 2013, Section 10 states the following:

(1) Every organ of state and public entity must apply any relevant code of good practice issued in terms of this Act in-

(a) Determining qualification criteria for the issuing of licences, concessions or other authorisations in respect of economic activity in terms of any law;

(b) Developing and implementing a preferential procurement policy;

(c) Determining qualification criteria for the sale of state-owned enterprises;

(d) Developing criteria for entering into partnerships with the private sector; and

(e) Determining criteria for the awarding of incentives, grants and investment schemes in support of Broad Based Black Economic Empowerment.

(2) (a) The Minister may, after consultation with the relevant organ of state or public entity, exempt the organ of state or public entity from a requirement contained in subsection (1) or allow for deviation therefrom if particular objectively verifiable facts or circumstances applicable to the organ of state or public entity necessitate an exemption or deviation."