THE FREE MARKET FOUNDATION
of Southern Africa

progress through freedom

SUBMISSION ON THE LIQUOR BILL, 2003
TO THE
PORTFOLIO COMMITTEE ON TRADE AND INDUSTRY

23 APRIL 2003

INTRODUCTION

This submission addresses only major issues. There are many issues of lesser significance or a technical nature which we omit for fear of diverting attention from core aspects.

GENERAL OBSERVATIONS AND RECOMMENDATIONS

1. Perpetuating apartheid-era policy

The Bill is unduly informed by the Liquor Act of 1989 and its predecessors which were an integral part of apartheid. In sympathy with the apartheid mindset, former liquor policy was excessively interventionistic and patronising, and was intended to minimise access to liquor by black South Africans (as consumers or entrepreneurs) on the assumption that they were inherently incapable of responsible behaviour.

Architects of new South Africa liquor policy should pay careful attention to its shameful history. Apartheid-era liquor law started with Lord Milner's Liquor Proclamation 100 years ago. He believed that black South Africans were inherently incapable of reaching the level of sophistication of whites, and that they, unlike whites, were incapable of dealing with liquor responsibly. This presumption led to 60 years of prohibition for blacks with relative ease of access for whites.

Needless to say, a substantial illegal liquor industry emerged with similarities to what happened under prohibition in the USA, the purpose of which was also, primarily, racist prohibition for blacks with a blind eye being turned to production, distribution and consumption by whites.

In a failed attempt at containing illegal liquor markets in historically black areas the former regime allowed blacks to consume liquor after 1960 provided it was purchased from monopoly government outlets in "townships" and "locations", or from a special window in a white-owned store.

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A necessary part of racist liquor policy was strict licensing and regulation. There was strictly limited number of outlets owned by favoured licensees. Elaborate records had to be kept and liquor had to be stored in specially secured premises.

In a non-racial, democratic and emancipated South Africa it is profoundly inappropriate to perpetuate this legacy. Part of South Africa's process of transition to liberation should entail a fundamental shift towards the kind of liquor policy that characterises free and modern societies.

In such countries liquor policy ranges from zero control, where liquor is treated like any other consumer product, to a form of licensing that is, in practice, no more than a registration formality.

In particular, regulation in modern democracies occurs in accordance with the rule of law, that is according to objective criteria, whereby everybody who meets objective requirements is automatically entitled to produce, sell or consume liquor. The rule of law in free societies requires the absence of discretionary or arbitrary gate-keeping. (In rare cases of no direct relevance to South Africa there are localised puritanical controls, such as isolated communes in Switzerland, or the notoriously puritanical state of Utah. There is also strict control or prohibition in a diminishing number of oppressive fundamentalist countries. The importance of uncommon examples is that they are the exceptions that prove the general rule.)

Increasingly in the modern world liquor is traded and available at all times and places. If a society purports, as ours does, to be emancipated with a government that treats its citizens like responsible adults capable of voting and enjoying the blessings and risks of freedom, it should reflect this in its liquor policy.

This Bill is profoundly ill-conceived in that it perpetuates the legacy of discriminatory and arbitrary entry barriers for entrepreneurs, and patronising and puritanical controls for consumers.

2. A Time for Change

Mindful of the long process that preceded this Bill we nonetheless urge government to reconsider the presumption that liquor legislation in the new South Africa should be a perpetuation of outmoded concepts that preceded it. We recommend a more appropriate zero-base approach, whereby truly new liquor policy is formulated *de novo* on the basis of only one assumption: that liquor is a product with distinctive socio-economic implications. To this end, legislation would do little more than curtail sales to youths and intoxicated adults. Since these are issues of a social nature they should be governed by Department of Social Services policy. Concerns about unhealthy concoctions are already governed by foodstuffs common law and/or Department of Health legislation.

The only aspects of the Bill appropriate for DTI regulation concern industry structure. We suggest that this should not be regulated, but that, if it is, the Bill should be confined to it.

If it is decided to combine divergent aspects of social, health and economic policy in a single Bill, it should be confined to these three concerns.

The remaining provisions in the Bill serve no economically or socially useful purpose. They will do no more than perpetuate discriminatory barriers and arbitrary powers inherited from the past. As presently formulated, they will necessitate a costly bureaucracy and result in extensive real or suspected corruption.

3. Provincial Competence

Under our new democratic Constitution, central government is no longer omnipotent. It has only those powers the Constitution confers on it, and no more.

In view of the unambiguous nature of both the Constitution and the Constitutional Court, judgement on the former Liquor Bill (*Ex Parte* President of the RSA: Constitutionality of the Liquor Bill, 2000 (1) SA 732 (CC)), we were surprised to see the reintroduction of central government controls over micro-manufacturing and retail sales in the new Bill. We presume the DTI obtained legal opinion to the effect that it could do so. If so, the opinion/s should be made public.

Our legal advice is that the Bill has changed in form but not substance. It is fundamentally the same as the Bill already rejected by the Constitutional Court. Unless we are mistaken, the drafters of the Bill did not understand the essence of the judgement. It was not a judgement about how the Bill was drafted, but about the attempt by central government to usurp exclusive provincial competencies. This means that the new Bill is likely to be as unconstitutional as its precursor. The subterfuge of introducing such Constitutional terminology as "national norms and standards" and "economic unity" does not subvert the Constitution by legitimising inherently unconstitutional powers.

On the question of provincial competence there are two additional important points:

3.1. Federalism

Rightly or wrongly South Africa is a federation with a federal constitution. For this reason, high level government officials attend international conferences of the world's federations at which the theory and practice of federalism is addressed. One of the realities of federalism with which the architects of this Bill do not seem reconciled, is that there are things which central governments simply may not do and others which it may do only under strict conditions. That central governments often want to control that which they may not is commonplace, which is why powers are curtailed constitutionally. For some reason, the architects of this Bill tried before and are trying again to exercise unconstitutional control over precluded areas of competence.

Even if there is a creative loophole through which the letter and spirit of the Constitution can be subverted, it should not be done. A culture of constitutionalism and the rule of law to which our Sate President has committed the country and much of our continent, and which is embodied in NEPAD, will be achieved only if central government actively and purposefully respects and promotes the values and provisions of the Constitution. The Constitution should not be seen as an unwelcome constraint on the legitimate ability to govern and the government should not try to get away with as much as it can.

The fact is that the Constitution is unambiguous about liquor licensing being an exclusive provincial competence and the government should respect this.

Accordingly, as a matter of respect for the clear intent of the Constitution, and as a matter of constitutional law, all attempts in this Bill to regulate in areas of provincial competence and to prescribe to provinces what they must do where the Constitution gives them dominion, should be removed.

3.2. Diversity

Apart from the Constitutional injunction on central government to leave liquor licensing to provinces, this Bill reflects a failure to understand the nature and virtue of diversity. It

comes across as a desperate attempt to achieve uniformity where uniformity is unnecessary and undesirable.

An obvious reason for having provinces and exclusive provincial competencies constitutionalised is the recognition of regional diversity. Why have provinces at all if there is policy uniformity? Land-use or urban transport policy for place A is inappropriate for place B. Likewise liquor policy.

If each province were free to formulate its own liquor policy, there would not only be differences that are appropriate to their own unique circumstances, but each would benefit from the "demonstration effect". They would be able to compare the effects of their policies with those in other parts of the country, thus enabling all provinces in the country to gravitate towards policies proven in practice to be the best.

Uniformity necessarily means that there is no way of identifying imperfections. Uniformity of most kinds is a sub-optimal policy environment.

For these additional reasons provisions in the Bill intended to impose uniformity coercively should be scrapped and administrative processes to that end should be minimised.

4. Administrative Discretion

It is a recognised principle of good law, and a requirement of the Constitution and the rule of law, that legislation should provide for a minimum of discretionary power, and when it does so, it should be subject to the Guidance Principle (Dawood and Another v minister of Home Affairs and Others 2000 (3) SA 936 (CC), and Janse van Rensburg NO and Another v Minister of Trade and Industry NNO 2001 (1) SA 29 (CC)). In other words, the legislature should make laws as objective as possible and, when it creates discretionary power, it is obliged to prescribe objective criteria according to which the power is to be exercised.

The doctrine of the Separation of Powers, also part of our Constitution, requires that it is the legislature (by way of statutes) and not the Executives (by way of regulation) that must prescribe those criteria.

There are sound jurisprudential reasons for these provisions being in our Constitution. Were there a better understanding and appreciation of the logic that informs them, there would be less propensity to undermine or ignore them in draft legislation. Firstly, if people do not know their rights and obligations, there will be wasteful confusion, uncertainty and conflict. Secondly, and more importantly, unconstrained discretionary power is the primary cause of corruption and the abuse of power. Corruption is one of South Africa's most disturbing and debilitating problems.

The problems of corruption and abuse should be addressed at two levels: by avoiding discretion and by ensuring that whatever discretion is retained is exercised according to maximally objective criteria, and subject to procedural checks and balances. Appropriate checks and balances include established and proven mechanisms such as mandatory transparency, accountability, due process, rights of appeal (to truly independent courts or tribunals), non-discrimination, and the like.

For these and other reasons, wherever the Bill creates executive discretion, it should specify the criteria according to which that discretion must or may be exercised, and it should provide for appropriate checks and balances.

5. The Appropriate Government Department?

This Bill targets health and social issues (subject to limited consultation with the Minister of Health, but not the Minister of Social Services).

We submit that regulation of manufacturing and distribution from a trade and industry perspective is a legitimate DTI area of departmental competence, but that health and social policy should be formulated by the appropriate departments: Health and/or Social Services respectively. For similar reasons to those that require the separation of legislative, executive and judicial powers, the consistent delineation of departmental functions should be maintained. The DTI does not have the health and social machinery or expertise of the appropriate departments. They, in turn, are not equipped to regulate economic policy.

SPECIFIC PROVISIONS

We now examine the Bill in the context of these principles.

Sections:

§ 2.(1)(a)(3) There is no provision in the Constitution authorising central government to regulate in areas of exclusive provincial or local competence if provincial or local governments choose to leave matters unregulated.

It is in any event a perfectly legitimate and frequently desirable policy to *not* regulate something. Arguably, in terms of the government's GEAR and NEPAD policies, it should be more inclined to deregulate than to regulate, and there should be no default assumption of an omnipresent regulatory imperative.

This sub-section should be deleted along with Schedule 1 and 2 to which it refers for these reasons and the reasons given in 3 and 4 above. It is simultaneously unconstitutional and undesirable.

§ 2.(1)(b) The objects of promoting entry, diversity and social responsibility are contradicted by provisions in the Bill and the Schedules which inhibit these laudable objectives, sometimes explicitly.

§ 3.(2) For the reasons given in 3 above central government has no national competence to regulate micro-manufacturing or retailing, and provinces should be free to leave liquor unregulated (although it is unlikely that they will exercise this constitutional option).

§ 3.(3) We suggest above that the mere expedience of calling national legislation in areas of exclusive provincial competence a matter of "norms and standards" does not convert incompetence to competence. Circumstances have not changed since the judgement on the former Bill. This sub-section appears to misconstrue the Constitutional Court's ruling in that case and indirectly in others.

§ 4.(1) Since the Bill envisages a prohibition of sale for consumption by manufacturers and distributors we submit that there is no case to be made for restrictively licensing

these two tiers. They are, and should be, governed by the same laws that govern all manufacturing and distribution.

To the extent that regulation is truly justified, it should be confined to common law or the sort of regulation governing the quality of other products, especially foodstuffs and beverages. In this context, the regulation of health and social aspects of liquor should, as we have argued, be a matter for concern and control by the Department of Health not the Department of Trade & Industry.

A minor terminological point is that here and elsewhere the term used is "register/ed". Since the Bill does not provide for registration but for restrictive licensing it should be amended either by having genuine registration (ie a formalistic procedure) or references to "registration" should be replaced by "licensing".

If there is to be a formal status, we recommend registration, not licensing. The term "license/ed" is used correctly with reference to the formality envisaged for micro-manufacturing and retailing.

§ 4.(2) The legal status of imported liquor is anomalous in the Bill. It is not clear whether manufacturers, distributors and retailers may themselves be importers, and if acting in nay of these capacities, to whom they may sell.

If the vertical separation and provincial regulation of activities is maintained, it makes sense to permit distributors and retailers to be importers for sale to retailers and consumers respectively.

§ 5. It is not clear why "concoctions" should be banned. Is it to protect manufacturers of alternatives? If so the idea is an illegitimate form of protectionism. It discriminates specifically against certain individuals in communities.

If the concern is a matter of health and social policy, prohibition should be replaced by the same regulations applying to other forms of liquor, and should, in any event, not be regulated by the DTI.

§ 5.(2) Apart from the above criticisms this prohibition is out of touch with reality. Everyone knows that thousands of South Africans produce "concoctions" for their own consumption and will continue doing so. If they are permitted in practice to do so, as they are and will be, the law should reflect the real world. If "concoctions" are treated as any other liquor product, they will, like all liquor, have to be safe and healthy, sold only by licensed persons, and not sold to minors or drunk adults.

The separation of concoctions from other liquor products is contrived, discriminatory, elitist and unrealistic. It should be scrapped.

§ 6. This section relates to liquor retailing which is an exclusive provincial competence. It is, however, one of the few provisions relating to retailing which could be defended on the grounds of being a national norm or standard. Even so, it should remain a matter of provincial discretion.

§ 7. The above comment on **§ 6** applies.

§ 7.(2) Point 4 above relating to discretionary power without objective criteria applies.

Although the purpose of a school radius restriction is not stated, we presume that it has to do with a concern about the influence of liquor retailing on school children. We suggest respectfully that the legitimacy of this provision is more apparent than real. It does not make sense for various reasons. Firstly, there are schools in buildings that have shops or restaurants in the same building or the immediate vicinity, especially in inner cities.

Within whatever radius is envisaged, there are already many liquor outlets. These are exempt from prohibition under the "grandfather clause" (**7.** (3)). In other words, the Bill envisages that there will be many schools with liquor outlets inside the radius, and there will be many more – almost whenever a new school is built. It is hard to imagine the logic whereby it is assumed that those schools that have new liquor outlets established near them will suffer adverse social consequences while new schools that establish themselves near existing liquor outlets will not. Furthermore, such a provision constitutes an unfair discrimination against new business.

Secondly, whatever radius is prescribed, there will be anomalies and contradictions. Children going to and leaving school will pass liquor outlets. The only conceivable effect of a radius restriction would be that they pass liquor licensed hotels, restaurants or grocery stores after, say, 10 minutes instead of 5 minutes of walking.

If the concern is that school children will frequent liquor outlets during school hours if they are too close to schools, the matter is taken care of by the prohibition on sales to minors.

Well-intentioned though this section is, we suggest deleting it on the grounds that it is probably unconstitutional and certainly ineffective and impractical.

§ 8. As with the age restriction under **§ 7.** we assume the desirable intention is not exposing children to potential social harm of alcohol. In the real world children under 16 tend to be found in liquor outlets in relatively safe contexts such as shebeens, taverns and private homes serving the country's poorest communities, and in small family-controlled inns and B&Bs. Questions regarding the employment of youth in such conditions is and should remain the responsibility of the Department of Social Services, which already has elaborate laws supported by a network of professional and empowered social workers. Child labour is also already governed adequately by the country's labour laws.

To introduce new controls relating to youth employment in this Bill is anomalous, over-lapping, unnecessary and confusing. It creates needless legal duplication and uncertainty, and brings within the DTI forms of control for which it is not equipped.

§ 9. Again, good intentions behind this section can be presumed, but again, there is a needless and confusing duplication of law. Being "drunk and disorderly" is already unlawful whether or not on "registered premises".

§ 9.(3) It is interesting that the "owner or occupier of the premises" is regulated by this sub-section, as opposed to the registered trader. We presume this is an inadvertent error and should be corrected. The owner of most registered premises will often be a property developer such as the owner of a shopping centre and the occupier may be someone like a hotel or restaurant chain.

Point 3 above relating to exclusive provincial competence applies.

§ 12.(2) This sub-section seeks to split the liquor industry into three strata, with a fourth anomalous "importer" not properly provided for. The stated objective for the rigid separation of manufactures, distributors and retailers is to promote entry, diversity and social responsibility. It is well known that one of the governments objectives is to create opportunities for black South Africans. However, the provision as it stands is likely to be counter-productive and impractical.

A major unintended consequence would be to exclude the majority of liquor traders in South Africa, shebeen and tavern owners, from vertical integration upwards. They, who are best placed to expand into distribution and manufacturing in a new liberalised environment will be precluded from doing so. They will be subjected to a regulatory ceiling and straitjacket.

The empowerment transactions that have already occurred within the industry are of this nature. An unintended perverse consequence to this provision will be that black South Africans who have enjoyed market-driven empowerment will be forced back to where they were. They will not enjoy the benefits of integration and increased expertise.

As far as distribution is concerned wholesaling is not a characteristic of the South African liquor industry or the liquor industry in other countries with normalised liquor law. In almost all other contexts there is a view, often mistaken, that the "middleman" is an undesirable exploiter. In agriculture, for instance distributors are presumed to widen the gap between producers and consumers, and to increase prices disproportionately. Whilst this belief is based on faulty economic thinking, the government should not be in the business of forcing a "middleman" into an industry where direct, efficient and low cost methods of distribution have been developed over many decades. This will defeat the object to "reduce the social economic and other costs of alcohol consumption" – **§ 2.**

At the upper end of the market, manufacturing, the idea is impractical or undesirable. It is well known that South Africa's largest and internationally competitive manufacturers are integrated public companies with rapidly growing number of black shareholders. These companies are characterised by vertical and horizontal integration in complex groups. They are sole owners or hold controlling or minority interests in, companies that manufacture, distribute and retail. One company, for instance, has a controlling interest in the country's leading hotel and liquor retail chains. The effect of this prohibition could be, although this is unclear, that such groups would have to cease to exist at great detriment to the economy and cost to the country.

If the terminology in the Bill is interpreted by the Courts to refer only to specific companies (persons) and not groups of companies, the relevant provisions would be superfluous in that the envisaged degree of separation already exists as a standard method of business organisation.

In other words, depending on what these provisions mean, they are either exceedingly undesirable and impractical, or essentially meaningless and superfluous. In the latter case their only practical effect will be severe unintended discrimination against the people the Bill intends benefiting.

§ 14.(3) Point 4 relating to discretion without guidance applies.

§ 17. There seems to be a confusion regarding the purpose of this provision. To the extent that this Bill governs manufacturing and distribution, a legitimate national competence, there is no need to regulate structural aspects of the premises. Is it truly envisaged that a liquor manufacturer is going to have the structure of its premises regulated? We can think of no reason for wanting to do so. If this section was drafted with retailers in mind it is subject to points 3 and 4 above relating to exclusive provincial competence and discretion without guidance.

§ 23. As a general rule of good law and in accordance with the constitutional requirement of separation of powers, administrative discretions of the kinds envisaged in this Bill should be subject not only to review but appeal. We point out that 23.(1) is superfluous in that all administrative actions are subject to review automatically.

Since the Minister may delegate ministerial powers to any government official, which presumably means that delegated powers will in practice be exercised by officials rather than ministers it is all the more important for there to be a right of appeal.

It is obviously inappropriate and unrealistic for the Minister to exercise powers conferred in this Bill personally. Such far-reaching discretionary powers without objective criteria are, as we have argued, undesirable and probably unconstitutional. The reason for subjecting discretionary power to such checks and balances is that discretion creates obvious and probably irresistible temptations for corruption and abuse. An additional essential mechanism for reducing the propensity for corruption is to subject discretionary power to appeal (on the merits).

§ 45.(b)(1) If the Director of Public Prosecutions has declined to prosecute that should be the end of the matter. One of the essential requirements of a rule of law, which is a binding provision in our Constitution, is that people should not be exposed to prosecution more than once for a single transgression. If the state cannot persuade the public prosecutor to prosecute it should not have a second option. This will lead to needless victimisation and will compromise the objectivity of law.

§ 56. This section amounts to subterfuge in an attempt to legitimise what the Constitutional Court has already declared to be unconstitutional. The Bill should not try to subvert unambiguous constitutional provisions and Constitutional Court judgements.

Schedules 1 & 2
These Schedules should be dropped for reasons explained in Point 3 above relating to exclusive provincial competence.

Schedule 4
Since the Liquor Act of 1989 regulates retail trade, which is an exclusive provincial competence, a perfectly legitimate policy for a province would be to continue having its liquor trade governed by that Act. For reasons explained above regarding its racist history, we do not recommend this, but as a matter of Constitutional elegance we point out that the national government should not be repealing laws governing matters of exclusive provincial competence.

If there is to be provision for such repeal it should state that each province may repeal the 1989 Act to the extent that it applies to that province.

The provisions of that Act which govern provisions of national competence are few since it is concerned with liquor retailing. At most, those provisions can be repealed in Schedule 4.

Memorandum on the Objects of the liquor Bill 2003
We note that this memorandum implies that there has been no cost benefit or regulatory impact assessment. In accordance with modern legislative convention the supporting memorandum to a bill should specify and quantify the intended consequences and all direct and indirect costs, including administrative costs to the department concerned, costs to other departments such as policing and the courts, and compliance costs to the private sector.

In the absence of such data there is no way for the cabinet or parliament to know whether the legislation is likely to have net benefits or disadvantages.

CONCLUSION

We recommend the abandonment of the Bill *in toto*, because most of it refers to areas of exclusive provincial competence, and that which does not, should either not be regulated, or be left to more appropriate departments.

We confirm our request to support this submission with oral evidence.

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