

# LAW REVIEW PROJECT

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17 April 2013

## COMMENTS to the

**DIRECTOR-GENERAL OF THE DEPARTMENT OF TRADE AND INDUSTRY**  
(for the attention of Ms. Baneke Dalasile)

about the proposed

**LICENSING OF BUSINESSES BILL, 2013**  
[made known under Notice 231 of 2013]

## **1. Introduction**

- 1.2. The Law Review Project (also referred to here as ‘the LRP’ or ‘the Project’) submits written comments as follows on the proposed ‘Licensing of Businesses Bill’ (hereinafter referred to as ‘the proposed Bill’ or ‘the draft Bill’).
- 1.3. The proposed Bill was published by the Minister of Trade and Industry under a General Notice<sup>1</sup> in the *Government Gazette* on 18 March 2013.<sup>2</sup>

## **2. Time limit for submission of comments**

- 2.1. The Notice states that the proposed Bill is published for public comments, and that interested persons may submit written comments on the Bill.
- 2.2. The website of the Department of Trade and Industry states that comments can be e-mailed<sup>3</sup> by no later than Thursday, 18 April 2013.<sup>4</sup>

## **3. Summary**

- 3.1. The Bill contains many unconstitutional provisions that if it is enacted would likely result in its being declared invalid.
- 3.2. The Bill’s clauses authorising seizure of goods are arbitrary and unconstitutional.<sup>5</sup>
- 3.3. The Bill’s measures to prohibit persons convicted under certain laws (dealing with counterfeit goods, safety of foodstuffs, customs and excise duty, income and value-added taxes, and immigration) from carrying on business are disproportionate and unconstitutional. Cancelling the business licences of persons convicted under those laws is excessive punishment for persons who would already have been sentenced to a criminal penalty. Denying a person the right to carry on his business is akin to a forfeiture of assets. Ordinary crime is in issue, and existing conventional criminal penalties for the crime in question are adequate. These are not crimes that require extraordinary measures for their prevention. Cancellation of a business licences has a disproportionate effect, on the business owner as well as on his employees. Further harsh measures under this Bill are redundant and doubly punitive. This is particularly so when the offence in question has resulted in a criminal conviction (and if the operative law already provides for confiscation, as the counterfeit-goods, foodstuffs and customs-and-excise laws do). This requirement of proportionality is an imperative imposed by constitutional disdain for arbitrary dispossession of property and unwarranted or excessive punishment.<sup>6</sup>
- 3.4. While the national government has the power to enact legislation regulating trade, the Bill goes too far, and unconstitutionally infringes provinces’ exclusive legislative powers over licensing and control of undertakings that sell food to the public, and over street trading.<sup>7</sup>

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<sup>1</sup> Notice 231 of 2013.

<sup>2</sup> Government Gazette 36265 of 18 March 2013.

<sup>3</sup> To Ms Baneka Dalasile at bdalasile@thedti.gov.za.

<sup>4</sup> DTI website, <http://www.dti.gov.za/default.jsp>, ‘Call for comments on the Licensing of Businesses Bill’.

<sup>5</sup> See part 4 below.

<sup>6</sup> See part 5 below.

<sup>7</sup> See part 6 below.

- 3.5. Parliament may intervene in a matter of exclusive provincial competence, when necessary to maintain essential national standards. Yet the Bill fails to show that the national interest requires uniform national legislation about the licensing of undertakings that sell food to the public or street trading.<sup>8</sup>
- 3.6. The Bill delegates to the Minister a legislative power to set norms and standards nationally. If this envisages the setting of ministerial standards for licensing undertakings that sell food to the public or for street trading, the Bill is an unconstitutional delegation to the Minister of a legislative power which the Constitution requires that Parliament should enact itself when it intervenes in these exclusive provincial matters. Such abdication of Parliament's legislative authority to the executive is invalid. Parliament should itself lay down any essential policy or standard if exercising a legislative power to intervene.<sup>9</sup>
- 3.7. The Bill lacks guidelines about licence conditions that licencing authorities may impose. Licensing authorities can impose such conditions as they deem fit when issuing licences. The Bill even gives licensing authorities sole discretion to amend a licensee's licence conditions after issue of the licence. This is inconsistent with the rule of law.<sup>10</sup>
- 3.8. Appeal bodies provided for in the Bill are not independent. Licensing authorities establish their own appeal bodies to hear appeals from decisions of the licensing authorities. There is no guarantee that those appeal bodies will be impartial and independent.<sup>11</sup>

#### **4. Bill's clauses authorizing seizure of goods are arbitrary and unconstitutional**

- 4.1. The Bill provides that an inspector may 'remove any goods on the premises and confiscate them'.<sup>12</sup>
- 4.2. That clause of the Bill does not require the inspector to give any reason for removing and confiscating goods, nor requires the inspector to abide by any fair procedure before removing and confiscating them.
- 4.3. The clause authorises an arbitrary deprivation of property, and will for that reason be held unconstitutional and invalid. The Constitution provides that no law may permit arbitrary deprivation of property.<sup>13</sup> Property should as a rule only be expropriated subject to compensation, the amount of which have either been agreed to by those affected or decided or approved by a court.<sup>14</sup>
- 4.4. Deprivation of property is arbitrary when the law does not provide sufficient reason for the particular deprivation or is procedurally unfair. Usually, a more compelling purpose will have to be established for the depriving law to constitute sufficient reason for the deprivation if the property is ownership of property such as a physical movable.<sup>15</sup>

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<sup>8</sup> See part 7 below.

<sup>9</sup> See part 8 below.

<sup>10</sup> See part 9 below.

<sup>11</sup> See part 10 below.

<sup>12</sup> Bill cl 34(1).

<sup>13</sup> Constitution s 25(1).

<sup>14</sup> Constitution s 25(2)(b).

<sup>15</sup> *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Services and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (7) BCLR 702 (2002 (4) SA 768) (CC) para [100].

## 5. Measures to prohibit convicted persons from carrying on business are disproportionate

5.1. The Bill empowers the licensing authority to revoke a person's licence or order the person to stop trading, if the person has been found guilty of contravening—

5.1.1. the laws governing counterfeit goods;<sup>16</sup>

5.1.2. the laws governing customs and excise<sup>17</sup> or 'any applicable tax legislation'<sup>18</sup> (presumably a reference to the statute governing tax administration<sup>19</sup> dealing with compliance with tax laws including the laws governing income taxation<sup>20</sup> and value-added tax,<sup>21</sup>;

5.1.3. the laws governing safety of foodstuffs, cosmetics and disinfectants;<sup>22</sup> or

5.1.4. the laws governing immigration<sup>23</sup> or employing an illegal foreigner<sup>24</sup> or refugees.<sup>25</sup>

5.2. It is submitted that cancelling the business licences of persons convicted of these offences would constitute an unjustifiable and excessive punishment for persons who, after their conviction for the offence, would already have been sentenced to a criminal penalty.

5.3. Cancelling a person's business licence for having been found guilty of contravening a law would in effect require the person to close his business. This goes far beyond normal restrictions on a business. It amounts to depriving a person of his business. The Constitution lays down that no one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.<sup>26</sup> This constitutional guarantee prohibits what amounts to a substantial interference or limitation that goes beyond normal restrictions on property use or enjoyment found in an open and democratic society.<sup>27</sup>

5.4. The Constitution's provision about freedom of trade, occupation and profession says that every citizen has the right to choose their trade, occupation or profession freely.<sup>28</sup>

5.5. And the Constitution states that everyone has the right to freedom and security of the person, which includes the right not to be treated or punished in a cruel, inhuman or degrading way.<sup>29</sup>

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<sup>16</sup> Counterfeit Goods Act 37 of 1997: Bill cl 18(1)(c).

<sup>17</sup> Customs and Excise Act 91 of 1964.

<sup>18</sup> Bill cl 18(1)(d).

<sup>19</sup> Tax Administration Act 28 of 2011.

<sup>20</sup> Income Tax Act 58 of 1962.

<sup>21</sup> Value-added Tax Act 89 of 1991.

<sup>22</sup> Foodstuffs, Cosmetics and Disinfectants Act 54 of 1972: Bill cl 18(1)(e).

<sup>23</sup> Immigration Act 13 of 2002.

<sup>24</sup> The Immigration Act defines an 'illegal foreigner' as a foreigner who is in the Republic in contravention of the Act.

<sup>25</sup> Refugees Act 130 of 1998.

<sup>26</sup> Constitution s 25(1).

<sup>27</sup> *Offit Enterprises (Pty) Ltd and Another v Coega Development Corp (Pty) Ltd and Others* 2011 (2) BCLR 189 (CC) paras [38]–[39].

<sup>28</sup> Constitution s 22. This provision also provides that the practice of a trade, occupation or profession may be regulated by law.

<sup>29</sup> Constitution s 12(12)(e). The previous Constitution provided, similarly, that no person shall be subject to cruel, inhuman or degrading treatment or punishment.

The concept of proportionality goes to the heart of the enquiry as to whether a punishment is cruel, inhuman or degrading.<sup>30</sup>

5.6. It is submitted that:

5.6.1. Denying a person the right to carry on his business is akin to a forfeiture of assets, as well as being an excessive punishment. Even though the government might intend such a statutory forfeiture of assets to pursue a worth and noble objective aimed at curbing crime, there is no gainsaying that in effect it would be draconian in effect. Asset forfeiture constitutes a serious incursion into well-entrenched civil protections, particularly those against arbitrary and excessive punishment and against arbitrary confiscation of property. Ordinary crime is in issue, and existing conventional criminal penalties for the crime in question are adequate. These are not crimes that require extraordinary measures for their prevention. Cancellation of a business licences has a disproportionate effect, on the business owner as well as on his employees.

5.6.2. In assessing the proportionality of a forfeiture, criminal penalties (including forfeitures) already incurred must be taken into consideration. Further harsh measures under this Bill are redundant and doubly punitive. This is particularly so if the offence in question has resulted in a criminal conviction (and if the operative law already provides for confiscation). When the Legislature designates a set of remedies to combat a specified crime, the remedies are normally intended to be effective and exhaustive. The requirement of proportionality is a constitutional imperative. It is imposed not by the statute but by constitutional disdain for arbitrary dispossession of property and unwarranted or excessive punishment.<sup>31</sup>

5.7. The other statutes, besides imposing their own criminal penalties, also already provide for forfeiture of assets:

5.7.1. The statute governing counterfeit goods already provides that the court convicting a person of an offence under that statute may declare the counterfeit goods in question to be forfeited to the State.<sup>32</sup>

5.7.2. Also, the statute governing the safety of foodstuffs, cosmetics and disinfectants likewise provides that the court convicting any person of an offence under the statute may declare any foodstuff, cosmetic, disinfectant, appliance, product, material, substance or other object in respect of which the offence has been committed or which was used for, in or in connection with the commission of the offence, to be forfeited to the State.<sup>33</sup>

5.7.3. Similarly, the statute governing customs and excise provides that any goods imported or otherwise dealt with contrary to the provisions of this Act or in respect of which any offence under that statute has been committed are liable to forfeiture, wheresoever and in possession of whomsoever they are found.<sup>34</sup>

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<sup>30</sup> *Bull and Another v S; Chavulla and Others v S* 2002 (6) BCLR 551 (SCA) para [12].

<sup>31</sup> See *Mohunram and Another v National Director of Public Prosecutions and Another (Law Review Project as amicus curiae)* 2007 (6) BCLR 575 (2007 (4) SA 222) (CC) paras [118]–[137], decided in connection with the statute governing civil forfeiture of assets reasonably believed to have been an instrumentality of a an offence.

<sup>32</sup> Counterfeit Goods Act s 20.

<sup>33</sup> Foodstuffs, Cosmetics and Disinfectants Act s 20(1).

<sup>34</sup> Customs and Excise Act 91 of 1964 s 87(1).

5.8. The statute governing tax administration<sup>35</sup> and creates a variety of its own criminal offences relating to non-compliance with tax laws<sup>36</sup> and to tax evasion.<sup>37</sup>

## **6. Bill unconstitutionally infringes Provinces' exclusive legislative powers**

6.1. The proposed Bill would infringe certain of the exclusive legislative powers which in terms of the Constitution are reserved to the Provinces.

6.2. The Constitution lays down that the legislative authority of a province is vested in its provincial legislature, and confers on the provincial legislature the power to pass legislation for its province—

6.2.1. with regard to any matter within a functional area listed in the Constitution's schedule of functional areas of concurrent national and provincial legislative competence;<sup>38</sup> and

6.2.2. with regard to any matter within a functional area listed in the Constitution's schedule of functional areas of exclusive provincial legislative competence.<sup>39</sup>

6.3. The functional areas of concurrent national and provincial legislative competence include<sup>40</sup> (among others) the functional area of Trade. It follows that the draft Bill, which is a proposed national measure, may properly deal with matters of trade, but subject to what is said here below.

6.4. The functional areas of exclusive provincial legislative competence include<sup>41</sup> (among others)—

6.4.1. Licensing and control of undertakings that sell food to the public; and

6.4.2. Street trading.

6.5. The proposed Bill encroaches upon the exclusive legislative competence of the provinces to legislate with regard to the functional areas of the licensing and control of undertakings that sell food to the public, and of street trading.

6.6. The provinces are accorded power primarily in regard to matters which might appropriately be regulated within each province. The exclusive legislative competence of the provinces in regard to "licensing and control of undertakings that sell food to the public" and "street trading" have a narrower ambit than the national government's power to regulate "trade". The national government has the power to regulate trade, other than by regulating the licensing and control of undertakings that sell food to the public or street trading.<sup>42</sup>

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<sup>35</sup> Tax Administration Act 28 of 2011.

<sup>36</sup> Tax Administration Act s 234(a)—(o).

<sup>37</sup> Tax Administration Act s 235(a)—(e).

<sup>38</sup> Constitution, 1996, s 104(1)(b)(i) read with Schedule 4.

<sup>39</sup> Constitution, s 104(1)(b)(ii) read with Schedule 5.

<sup>40</sup> Schedule 4.

<sup>41</sup> Schedule 5.

<sup>42</sup> This analysis is based on the decision of the *Constitutional Court in Ex parte President of the Republic of South Africa, in re Constitutionality of the Liquor Bill* 2000 (1) BCLR 1 (2000 (1) SA 877) (CC).

## **7. No necessity shown for any essential national norms or standards**

- 7.1. Parliament may only intervene by passing legislation about a matter falling in a functional area of exclusive provincial competence, when this is necessary to ‘maintain economic unity’ or to ‘maintain essential national standards’ (among other things).<sup>43</sup>
- 7.2. The Bill fails to show that the national interest requires uniform national legislation prescribing detailed mechanisms to provincial legislatures for the licensing and control of undertakings that sell food to the public or street trading. The scale of the intrusion which the Bill envisages upon the provinces’ exclusive competence in regard to these matters has not been clearly justified. To that extent the national Parliament accordingly lacks competence to enact the proposed Bill, and the applicable provisions of the proposed Bill will be unconstitutional.<sup>44</sup>

## **8. Unconstitutional delegation of legislative power to set norms and standards**

- 8.1. A stated purpose of the Bill is ‘to set essential norms and standards applicable nationally’ relating to licensing of businesses.<sup>45</sup>
- 8.2. But the proposed Bill is silent about what national standards are essential, or indicate why it is necessary to intervene in matters of exclusive provincial competence to maintain those standards. Nor does the Bill enact any legislative measures setting any such necessary essential national standards.
- 8.3. Instead, the Bill merely says that the Minister<sup>46</sup> may, after consultation with the Minister for Local Government and relevant MEC, make regulations ‘prescribing national norms and standards’ regarding the requirements for application for licences and any matter relating thereto.<sup>47</sup>
- 8.4. This would be an unconstitutional delegation to the Minister of a legislative power which the Constitution requires Parliament should itself enact when it intervenes in these provincial matters.
- 8.5. While it is true that Parliament has authority to delegate some lawmaking functions, this power of delegation is not absolute. Any abdication, abandonment or surrender of Parliament’s legislative authority to the executive is invalid. It is an essential characteristic of legislative power that it should itself lay down any essential policy or standard.<sup>48</sup>

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<sup>43</sup> Constitution s 44(2). This provides that Parliament may intervene, by passing legislation with regard to a matter falling within a functional area listed in Schedule 5 (the Constitution’s schedule of functional areas of exclusive provincial legislative competence), when it is necessary to maintain national security, to maintain economic unity; to maintain essential national standards; to establish minimum standards required for the rendering of services; or to prevent unreasonable action taken by a province which is prejudicial to the interests of another province or to the country as a whole.

<sup>44</sup> In the case *Ex parte President of the Republic of South Africa, in re Constitutionality of the Liquor Bill* (see fn 42 above), the court held that the national Liquor Bill, 1998, went further than was necessary, in purporting to deal with retail sales of liquor by retailers or by manufacturers and micro-manufacturers whose operations were essentially provincial, and that those clauses rendered the Bill unconstitutional.

<sup>45</sup> Bill cl 2(d).

<sup>46</sup> Of Trade and Industry.

<sup>47</sup> Bill cl 41(2).

<sup>48</sup> *Executive Council of the Western Cape Legislature and Others v President of the Republic of South Africa and Others* 1995 (10) BCLR 1289 (CC) para [134].

## **9. Bill lacks guidelines about licence conditions licencing authorities may impose**

- 9.1. Licensing authorities are left with an unfettered discretion as to what conditions to impose when issuing licences. The Bill lays down no criteria or guidance regarding the type of conditions which a licensing authority can impose.
- 9.2. The Bill provides that a licensing authority may issue a licence ‘with such conditions [as] the licensing authority deems fit’.<sup>49</sup>
- 9.3. Similarly, the licensing authority can renew a licence with such conditions as it deems fit.<sup>50</sup>
- 9.4. And the licensing authority can approve an application to transfer a licence to another person, ‘subject to conditions’.<sup>51</sup>
- 9.5. The Bill will also authorise licensing authorities to amend any licence condition in their sole discretion ‘where it will be in the public interest to do so’.<sup>52</sup>
- 9.6. These provisions give licensing authorities wide powers to impose oppressive and unreasonable conditions. It is inconsistent with the rule of law.<sup>53</sup>

## **10. Appeal bodies not independent**

- 10.1. The Bill says that a licensing authority must establish a dispute resolution authority to deal with appeals against decisions of the licensing authority.<sup>54</sup>
- 10.2. If a licence applicant disputes a decision by a licensing authority relating to extension of the period for consideration of his application, he must refer the dispute to the alternative dispute resolution body established by the licensing authority.<sup>55</sup>
- 10.3. A licence holder may refer a decision by the licensing authority revoking his licence to the dispute resolution authority established by the licensing authority.<sup>56</sup>
- 10.4. Appeals should be decided by an independent body. If the licensing authorities establish their own appeal bodies to hear appeals from decisions of the licensing authorities, there is no guarantee that those appeal bodies will be impartial and independent.

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<sup>49</sup> Bill cl 6(2).

<sup>50</sup> Bill cl 12(2).

<sup>51</sup> Bill cl 21(2)(b).

<sup>52</sup> Bill cl 22(1) and (3).

<sup>53</sup> See Constitution s 1(c).

<sup>54</sup> Bill cl 29(1).

<sup>55</sup> Bill cls 7(4) and 13(4).

<sup>56</sup> Bill cls 17 (3) and 18(3).

## **About the Law Review Project**

Law Review Project NPC (also referred to here as ‘the Project’ or ‘the LRP’) is an independent legal research organisation founded to promote the removal of unnecessary, burdensome and unduly-restrictive laws with the aim of promoting economic development.

The Project makes submissions to government for the review of legislation and proposes and formulates legislative change to achieve this aim. It is a private-sector resource to assist governments.

The Project is a non-profit company. It receives funding from companies, organisations and individuals who support these goals.