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RULE OF LAW PROJECT
FREE MARKET FOUNDATION

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SUBMISSION TO THE DEPARTMENT OF TOURISM ON THE TOURISM AMENDMENT BILL, 2019

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CONTENTS

EXECUTIVE SUMMARY

The Tourism Amendment Bill represents a legally and economically unjustifiable intervention in the private and commercial affairs of ordinary South Africans. In the first quarter of 2019, the gross domestic product of South Africa contracted by over 3%, and the number of unemployed in this country is now dangerously close to 10 million individuals. The economy is not able to handle more paternalistic interference from the State, like the present bill. What is needed is less interference and an opportunity for the economy to breathe; for ordinary South Africans to be allowed to provide for their own livelihoods freely, for instance, by making their homes available for short-term rental.

Short-term home rentals like Airbnb have enabled people previously unable to do so to make a living for themselves. Just as ridesharing platforms like Uber opened up a whole new market for people in transportation, Airbnb has the same transformative potential in tourism. The Tourism Amendment Bill undermines this potential.

The claim that the bill seeks to level the playing field between the existing bed and breakfast and hospitality industry and the emerging short-term home rental industry, is misguided and ill-considered. If the Department of Tourism is truly concerned for the welfare of traditional establishments, it should rather remove restrictions on those businesses to make it easier for them to compete with short-term home rental hosts, rather than saddling the latter with unnecessary meddling in their affairs.

The bill is also constitutionally problematic. It contains vague, ambiguous and unclear terminology, and bestows upon officials in the executive government law-making powers that should be reserved for Parliament. The Annexure to this submission is a comprehensive discussion of the Constitution and the Rule of Law, and is necessary to understand the portions of this submission that deal with how the Tourism Amendment Bill falls foul of South Africa's founding constitutional values.

The Free Market Foundation's Rule of Law Project recommends the bill as a whole be reconsidered in light of the spirit, purport, and values underlying the Constitution and the Bill of Rights, such as freedom, equality, human dignity, and property rights.

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FREE MARKET FOUNDATION AND RULE OF LAW PROJECT

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

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

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

1. SHORT-TERM HOME RENTAL MARKET

Short-term home rentals, like Airbnb, have enabled people previously unable to make a living for themselves, to do so using their existing assets. Ridesharing platforms like Uber did the same, opening a whole new market for people in the transport industry. Tourism in South Africa remains a strong economic sector which services like Airbnb has benefited immensely by offering far greater choice in location and price to visitors, and allowing ordinary South Africans to become instant entrepreneurs.

Research in September 2018 suggested that 2 million guests have made use of Airbnb alone in South Africa since that platform started operations here. This translates into over R3.8 billion in revenue for hosts, and R9.9 billion in broader economic activity, supporting over 22,000 jobs. The guests mostly wish to experience specific neighbourhoods,[3] meaning location-based Airbnb regulation has the potential to undermine the whole market. Indeed, the fastest-growing Airbnb destinations in the world are in Africa: Nigeria, Ghana and Mozambique.[4]

2. ECONOMICS OF REGULATION

The Tourism Amendment Bill will allow the Minister of Tourism to specify certain thresholds for short-term home rentals. These thresholds might include, but it is unclear,[5] limitations on the number of nights guests may stay in short-term home rentals, how much income the hosts may earn, or how many guests may stay in an area given water consumption levels. Thresholds could theoretically relate to the pricing, zoning, income, and security of short-term home rentals. The tourism

1 www.freemarketfoundation.com.
2 www.ruleoflaw.org.za.
3 https://businesstech.co.za/news/mobile/271577/airbnb-numbers-in-south-africa-are-impressive/.
4 https://qz.com/africa/1388940/airbnb-booming-in-nigeria-ghana-mozambique/.
5 See the discussion on the vagueness of the bill's provisions below.

department justifies these thresholds on the basis that it allows everyone to get "their fair share" – essentially a type of forced 'redistribution of choice' from consumers who choose some hospitality providers, to others.[6]

All indications as to the intention of this intervention unfortunately point to cronyism: Protecting the economic *status quo* (large existing hospitality firms) at the expense of the public interest (more affordable, democratic and decentralised firms). Given South Africa's poor economic growth trajectory, now is absolutely not the time to introduce more regulation on the economy. Instead, the economy must be allowed to breathe. Entrepreneurs must be free to use their assets as revenue-generators without being unduly undermined by the State.

The tourism department justifies its intention by claiming to want to level the playing field: Ensure both the existing hospitality industry and the emerging short-term rental housing industry are regulated in a like fashion. But this can be done by easing or removing the burdensome regulations currently being imposed on existing bed and breakfast and hotel firms, to ensure both the existing industry and the emerging industry are subject to the undiluted regulation of market forces.

The Airbnb model has allowed for effective consumer regulation of quality, without the necessity of State involvement. Guests are able to 'rate' their hosts and their accommodation, which other guests can see in real time. Hosts are also able to rate their guests. This innovative system ensures that only the best short-term home rentals are successful.

The Tourism Amendment Bill represents an unjustifiable attack on ordinary South Africans' property rights. The FMF's *Khaya Lam* (My Home) land reform project is dedicated to ensuring previously-disadvantaged South Africans are freed from the shackles forced upon them by Apartheid tenure law, by facilitating the transfer of full and unambiguous title to their properties. Interventions like the present bill represent a step back in time for South Africa, where petty State officials are once again being put in charge of what we may and may not do with our property to make ends meet.

3. THE BILL'S INCONSISTENCY WITH THE CONSTITUTION AND THE RULE OF LAW

3.1 Disregarded constitutional rights and the constitutional spirit

That the idea of short-term home rentals, as inserted by clause 1(b) of the bill, are introduced into law for the purposes of regulation, is deeply concerning as far as South Africans' constitutional rights are concerned. It is easily forgotten that most of these so-called rental units are, in fact, private homes, where rights-bearing individuals live. In the interest of making ends meet in an increasingly slow and difficult economy, many South Africans have decided to use these assets to lift themselves out of poverty or ensure they do not become poor. By regulating short-term home rentals without good reason, government is infringing upon the right to freedom and security of the person (section 12), the right to privacy (section 14), the right to freely choose one's occupation (section 22), and the right to property (section 25).

[6] https://businesstech.co.za/news/business/311226/government-to-regulate-airbnb-in-south-africa/.

Furthermore, government is falling foul of the spirit, purport, and objects of the Constitution and particularly the Bill of Rights. Rights are meant to be enablers of action, to free individuals from arbitrary cultural, governmental, or social constraints. The bill betrays this spirit by imposing onerous requirements on an area of human activity in which no discernible mischief has been identified. Government proposes to control short-term home rentals for its own sake and not for the sake of any public interest goal. Were government serious about levelling the playing field between the existing hospitality industry and the emerging short-term home rental industry, it would have loosened the regulations on the former rather than imposing new regulations on the latter. Such an act would have been more consistent with the spirit, purport, and objects of the Bill of Rights.

The bill as a whole should be reconsidered, and preferably abandoned, in light of the values underlying the Constitution, the Bill of Rights, and the Rule of Law.

3.2 Lack of clarity around "thresholds": Vagueness and ambiguity

The bill suffers from the same problem as multitudes of other South African legislation: It contains at least one unclear, vague, and ambiguous provision that could have wide-ranging detrimental consequences.

The term "threshold", which appears in clause 2, is not defined in the bill nor are there any provisions that could guide the reader to understand what "threshold" is meant to mean in the context of the bill. Hypothetically, thresholds could relate to number of nights a guest may stay at a short-term home rental; the number of guests who may stay there at any one time or over a period; to the amount of money a short-term home rental host may charge for their service; to the amount of profit they may make over a period; or the amount of short-term home rentals that are allowed (or totally disallowed) in a particular area; etc. Having the power to make any of these determinations would be unacceptable in a constitutional democracy based on the values of freedom, equality, and human dignity. And with the term "thresholds" remaining unclarified, it amounts to bestowing upon the Minister an unqualified power to regulate by decree. "Thresholds" should be clearly defined.

3.3 Outsourcing democracy: Delegated, ministerial law-making

The bill directly, and indirectly through unclear provisions, empowers the executive to legislate by 'regulation' or 'determination'. We draw attention to three such instances.

Clause 2 empowers the Minister to "determine" norms and standards regarding the "thresholds" of short-term home rentals. As discussed above, the fact that "thresholds" is an undefined, open-ended term, already means the Minister has been given a virtually unrestricted power. With the addition of the power to determine so-called norms and standards regarding such thresholds, this power effectively means the Minister may make any decision regarding potentially anything related to short-term home rentals. The Minister, effectively, may make law for the short-term home rental industry. Such a power falls completely foul of the Rule of Law requirement that executive powers be circumscribed and guided by criteria, and that law-making power reside in Parliament, not in the executive. This clause should be removed.

Clause 18 empowers the Minster to determine, by executive fiat, what "other activity" a registered tourist guide in South Africa may undertake. This provision exists in the context of requiring individuals to be registered tourist guides before they can undertake the stated activities, such as

providing guide services or share information about heritage-related affairs. In other words, the Minister could "determine" that "casually discussing South African history" is another activity that tourist guides may undertake, and, as a result, it would bar any person who is not a registered tourist guide from casually discussing South African history. This amounts not only to substantive law-making by the executive, but also to a gross invasion of the right to freedom of expression and any other right that might conceivably be detrimentally affected by ministerial determinations. Clause 18 should be removed, to ensure that freedom of expression is secure from arbitrary interference.

Clause 22 bestows upon the Minister the power to "make regulations" that "enhance […] the tourist guiding experience", which could include "the setting of permissible ratios of tourist guides to tourists". This does not amount to a regulatory power, but a substantive, law-making power, because there are no limiting criteria on what kinds of regulations the Minister could make to ensure tourists have a "better" experience. For example, the Minister might decide that all tourist guides must dress up like clowns to offer tourists an enhanced experience, and tourist guides will then need to comply lest they get in trouble with government. This example is absurd, but illustrates that the clause's current wording would allow the Minister to make such absurd decisions. This is not conducive to a society based on the value of the Rule of Law. There is also no reason for government to have the power to determine "permissible ratios" of tourist guides to tourists. The market is eminently able to make these determinations. Clause 22 should be amended to include limiting criteria that regulates the kinds of decisions the Minister can make in this respect, or removed.

3.4 Absence of socio-economic impact assessment

The bill was published in the *Government Gazette* without the required accompanying socio-economic impact assessment.

We have attempted to find the final socio-economic impact assessment on the Tourism Amendment Bill but to no avail. If the assessment was not conducted, government is falling foul of its constitutional commitment to facilitate public involvement in policy- and law-making by providing timely and accurate information. The bill is also potentially irrational because no evidence exists that 1) it is being enacted for a legitimate government purpose or 2) that the interventions it proposes are reasonably capable of producing the expected results.

ANNEXURE: THE CONSTITUTION AND THE RULE OF LAW

1. The Constitution

The Constitution contains various provisions, especially in the Bill of Rights, that protect the freedom of South Africans to determine their own affairs.

The most important provision underlying all of the other provisions is found in section 1 of the Constitution – the Founding Provisions. Section 1(a) provides that South Africa is founded on "[h]uman dignity, the achievement of equality and the **advancement of human rights and freedoms**" (my emphasis). This provision permeates all the provisions of the Bill of Rights by virtue of being a founding value.

Other provisions relevant to the advancement of human rights and freedoms of choice include the following:

- Section 7(1) provides that the Bill of Rights "enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom" (my emphasis). Section 9(2) provides that the right to equality "includes the full and equal enjoyment of all rights and freedoms".
- Section 10 provides that "[e]veryone has inherent dignity and the right to have their dignity respected and protected". According to the Department of Justice and Correctional Services, this means that "[n]o person should be perceived or treated merely as instruments or objects of the will of others. Every person is entitled to equal concern and to equal respect".[7]
- Section 12(1)(a) provides that everyone has the right "not to be deprived of freedom arbitrarily or without just cause" and section 12(1)(c) guarantees the right of everyone "to be free from all forms of violence from either public or private sources".
- Section 14 guarantees the right to privacy, meaning private affairs should not be interfered with or monitored without consent.
- Section 25 guarantees the right of everyone to be secure in their property unless the property is expropriated for a public purpose or in the public interest with compensation. No expropriation may be arbitrary.

Chapter 2 of the Constitution – the Bill of Rights – does not 'create' rights, but merely protects pre-existing rights from infringement. Section 7(1) states that the Bill of Rights "enshrines" the rights, not creates them. Enshrining something, in the constitutional sense, means to place that thing somewhere where it is protected, in this case, in a constitution.[8] South Africans have rights outside of the Constitution, and if a provision in the Bill of Rights is repealed, that does not mean South Africans 'lose' that right. If this were the case, there would be little use in referring to rights as 'human' rights, as section 1 and the Preamble of the Constitution do. South Africans are all rights-

[7] http://www.justice.gov.za/brochure/2014_ConstitutionRights.pdf/.

[8] https://dictionary.cambridge.org/dictionary/english/enshrine.

bearing entities because we are humans with dignity and individuality, not because government has 'given' us those rights.

The rights in the Bill of Rights can be limited by operation of section 36, but the basic essence of the right in question must remain. Indeed, if protection for human rights is removed from the Constitution or otherwise perverted through legislative 'limitation', South Africa's constitutional project will be severely undermined in that the highest law will continue to recognise the rights in question, but will not adequately protect them. This is not a situation South Africans would want to find themselves in.

By implying that government can extinguish rights simply by enacting legislation dressed in the garb of 'protecting' the people while undermining their freedom, the impression is created that rights are an idea owned by the State, and not the people. This would be faulty both according to human rights theory, but also according to the logic of the Constitution itself.

2. The Rule of Law

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

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

> "[65] The doctrine of the rule of law is a fundamental postulate of our constitutional structure. This is not only explicitly stated in section 1 of the Constitution but it permeates the entire Constitution. The rule of law has as some of its basic tenets:
>
> > 1. the absence of arbitrary power – which encompasses the view that no person in authority enjoys wide unlimited discretionary or arbitrary powers;
> >
> > 2. equality before the law – which means that every person, whatever his/her station in life is subject to the ordinary law and jurisdiction of the ordinary courts.
> >
> > 3. the legal protection of certain basic human rights.
>
> [66] The concept of the rule of law has no fixed connotation but its broad sweep and emphasis is on the absence of arbitrary power. In the Indian context Justice Bhagwati stated that:
>
> > 'the rule of law excludes arbitrariness and unreasonableness.'

> I would also add that it excludes unpredictability. In the present case that unpredictability shows clearly in the fact that different outcomes resulted from an equal application of the law."[9]

The Rule of Law thus:

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

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

> "The rule of law requires that laws should be certain, ascertainable in advance, predictable, unambiguous, not retrospective, not subject to constant change, and applied equally without unjustified differentiation."[10]

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

> "[The Rule of Law is threatened] when laws are such that it is impossible to comply with them, and so are applied by **arbitrary discretion** […]"[11]

Friedrich August von Hayek wrote:

> "The ultimate legislator can never limit his own powers by law, because he can always abrogate any law he has made. The rule of law is therefore not a rule of the law, but a rule concerning what the law ought to be, a meta-legal doctrine or a political ideal."[12]

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

Albert Venn Dicey, known for his *Introduction to the Study of the Law of the Constitution*, and considered a father of the concept of the Rule of Law, wrote that the Rule of Law is "the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even wide discretionary authority on the part of the government".[13]

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9 *Van der Walt v Metcash Trading Ltd* 2002 (4) SA 317 (CC) at paras 65-66. Citations omitted.
10 Good Law Project. *Principles of Good Law.* (2015). 14.
11 Good Law Project (footnote 10 above) 29.
12 Von Hayek FA. *The Constitution of Liberty.* (1960). 206.
13 Dicey AV. *Introduction to the Study of the Law of the Constitution.* (1959, 10th edition). 202-203.

Dicey writes "the rule of law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of constraint".[14] He continues, saying the Rule of Law means "the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government".[15]

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

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

The fact that some discretion should be allowed is a truism; however, the principle that officials may not make decisions of a substantive nature still applies. Any decision by an official must be of an enforcement nature, i.e. they must do what the legislation *substantively* requires. For instance, an official cannot impose a sectoral minimum wage. The determination of a minimum wage is properly a legislative responsibility because it is of a substantive nature rather than mere enforcement. Unfortunately, the Basic Conditions of Employment Act gives the Minister of Labour the authority to make "sectoral determinations" – which includes determining a minimum wage – which is a clear violation of the Rule of Law and the separation of powers.[16]

3. The imperative of impact assessments

The most important tenet of the Rule of Law is its prohibition on arbitrariness. Arbitrariness is not only a symptom of unfair and bad governance, but is also very harmful to the economy, as it leads to uncertainty and means people and businesses cannot plan their affairs ahead of time.

The opposite of arbitrariness is reasonableness. Reasonableness consists of two elements, namely, rationality and proportionality. Proportionality means that there must not be an imbalance between the adverse consequences of a policy and the beneficial consequences.[17] Rationality means that evidence must support the policy. Stated differently, there must be a rational connection between the purpose of the policy and the solutions proposed.[18] It has also been said that a third element, effectiveness, is a part of reasonableness.

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14 Dicey (footnote 13 above) 184.
15 Dicey (footnote 13 above) 198.
16 Section 51 of the Basic Conditions of Employment Act (75 of 1997).
17 Hoexter C. *Administrative Law in South Africa*. (2012). 344.
18 Hoexter (footnote 17 above) 340.

It stands to reason that the requirement of rationality, read together with section 195(1)(g) of the Constitution, which states the principles according to which the public administration must function, provides that transparency "must be fostered by providing the public with timely, accessible and accurate information", requires that policy or legislative interventions must be supported by demonstrable evidence.

To determine whether a policy will have the consequence intended by the enacting authority, a study must be done as a matter of course, and must be publicly available to satisfy the principle of transparency. If a study is not conducted, it means the intervention is not supported by evidence, and is therefore irrational and unconstitutional, and if a study is not released to the public, government is failing to comply with section 195(1)(g), and thus, the process is unconstitutional. These studies are known as socio-economic impact assessments (SEIAs).

Without published SEIAs, government is called upon to *judge for itself* whether its *own* policies are reasonable. Such a state of affairs would make the Rule of Law a redundant concept.

For the people to have a say in the decisions that affect their lives, they must know how the decision was arrived at and on what basis, and their participation must be meaningful (in other words, government must engage in good faith) and not merely a façade. Without a SEIA, the public cannot participate in the policy-making and law-making processes as mandated by the Constitution.

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

> "Although widely divergent, all the international assessment models amount ultimately to institutionalised procedures for determining the need for a law and its expected benefits. They are also concerned with the cost to government of implementation, as well as the capacity of government to police and enforce the law and the cost to the public of compliance. Other aspects considered are the economic and other likely impacts, the prospect of unexpected or unintended consequences; and the behaviour modifications likely to be promoted by the law and distortions that might flow from them."[19]

It goes on to describe what a SEIA would encompass:

> "2. Socio Economic Impact Assessment (SEIA). Multi-faceted analysis *and quantification* of:
>
> 2.1 The purposes of laws – precisely what "mischief" they are addressing;
>
> 2.2 Desired consequences;
>
> 2.3 Estimated secondary and unintended effects, including impacts on the economy or society in general;
>
> 2.4 Feasibility and efficacy – prospects in practice of the law being observed, and if not, enforced by officialdom, police and the courts;

[19] Good Law Project (footnote 10 above) 34.

2.5 Costs and benefits – accurate and comprehensive estimates of costs of administration and implementation, enforcement and policing, compliance and avoidance/evasion/resistance;

2.6 Inter-departmental considerations – the extent to which other departments are implicated;

2.7 Administration and budget – advance provision for all budgetary, staffing, training and related needs; diversion or dilution of resources and capacity."[20]

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

"3. The role of SEIAS

SEIAS aims:

To minimise unintended consequences from policy initiatives, regulations and legislation, including unnecessary costs from implementation and compliance as well as from unanticipated outcomes.

To anticipate implementation risks and encourage measures to mitigate them."[21]

The DPME regards a SEIA as more than a mere cost-benefit analysis. SEIAs, instead, must contribute to improving policy, rather than measuring their net value. It must, furthermore, "help decision makers to understand and balance" the impact of policy on different groups within society.[22]

That regulations or legislation can lead to unintended consequences is acknowledged by government. They could occur because of inefficiency, excessive compliance costs, overestimation of the benefits associated with the regulation, or an underestimation of the risks involved with following through with the regulation.[23]

The SEIA System applies to legislation and regulations, as well as policy proposals.[24]

[20] Good Law Project (footnote 10 above) 35.
[21] Department of Planning, Monitoring and Evaluation. "Socio-Economic Impact Assessment System (SEIAS): Guidelines." (2015). 4.
[22] DPME (footnote 21 above) 7.
[23] DPME (footnote 21 above) 4.
[24] DPME (footnote 21 above) 8.