

DRAFT LIQUOR AMENDMENT BILL, 2016
JOINT COMMENT to the
DIRECTOR-GENERAL OF THE DEPARTMENT OF TRADE AND INDUSTRY
(for the attention of Ms Nkoe Ramphele) from

 <p>African Cooperative for Hawkers and Informal Business – Gauteng 10,000 members</p>	 <p>Afrikaanse Handelsinstituut 7,000 members</p>
 <p>Confederation of Employers of Southern Africa 4,000 members</p>	 <p>Ekasi Entrepreneurs 14,000 members</p>
 <p>FREE MARKET FOUNDATION</p>	 <p>National African Federated Chamber of Commerce & Industry</p> <p>National African Federated Chamber of Commerce & Industry – Johannesburg 9 regional sectors: SALTHA (tourism), NAFCON (construction), NIC (manufacturing), NAFSEC (security), ACHIB (informal business), NAFTO (transport), SAMEC (mining), Women and Youth</p>
 <p>National Employers' Association of South Africa 13,000 members</p>	 <p>South African Liquor Traders Association 20,000 members</p>
 <p>Restaurant Association of South Africa 3,000 members</p>	 <p>Vuma Liquor Traders Association 60 members</p>

The draft Liquor Amendment Bill is unconstitutional

The draft Liquor Amendment Bill cannot be rescued. The Constitutional Court has already ruled its conceptually identical precursor unconstitutional. Since it is fundamentally unconstitutional it should be abandoned *in toto*. It cannot be rescued by being cosmetically and linguistically massaged. What was unconstitutional about the prior bill was its substance not its form. This bill is unconstitutional for precisely the same reason.

The National Liquor Policy mentions the fact that the earlier attempt at centralised control of liquor licencing was found by the court to be unconstitutional. When the earlier bill was presented to President Mandela for his signature he refused to assent to it because he regarded it as unconstitutional. He was an astute jurist, especially conversant with and concerned about constitutional law and the rule of law (which is a foundational provision of the constitution). He knew that liquor licencing is an exclusive provincial competence beyond the reach of parliament. The court agreed and the bill was scrapped as this bill should be. There is no rational basis for resurrecting the invalid concept now.

The drafters of this bill have simply cloaked it in new form. Central licencing regulation does not become constitutional if called "registration"; licencing conditions do not become constitutional if called "norms and standards". Every lawyer knows courts "pierce the veil" of form to determine substance.

No matter how skilfully this bill's unconstitutionality is disguised, it remains fundamentally unconstitutional and should be scrapped forthwith. It cannot be tweaked into legitimacy.

Public consultation in bad faith

A further fatal flaw calling for the Bill to be abandoned *in toto* is that it is the product of bad faith public consultation. Multiple far-reaching absurdities and the absence of basic legal and drafting expertise were brought to the attention of the DTI when the draft National Liquor Policy was published for comment. It was pointed out, for instance, that the provisions governing where liquor could be traded lawfully effectively declare the entire country a prohibited area, and that core words were amorphous and undefined.

Such flaws could hypothetically be cured. In truth they are so profound that the bill cannot be rescued.

Proposals are ineffective

Its third fatal flaw is there is absolutely zero reason to believe that anything proposed will be effective. It is to overcome this sort of thing that the Cabinet has ruled that all laws and policies must be preceded by a properly and objectively conducted Socio Economic Impact Assessment (SEIA). None has been done for the National Liquor Policy nor the draft Liquor Amendment Bill. They are therefore both invalid.

(In the unlikely event that a SEIA was conducted, it has not been published, did not involve public participation and could not conceivably have justified what is in the draft Bill.)

The Bill is a manifestation of a desire to combat alcohol abuse. It is devoid, however, of any basis for believing that it will have benefits remotely approaching the bountiful negative impacts it will clearly have for all South Africans in need of sensible liquor policy.
