



African Centre for Cities, University of
Cape Town, Private Bag X3, 7701 ,
South Africa
Tel: (021) 650 2057 / (082) 8023123
E-mail: caroline.skinner@uct.ac.za

Director General
Department of Trade and Industry
Private Bag X84
Pretoria 0001

Att: Ms Baneka Dalasile

Re: Licensing of Businesses Bill 2013 - WIEGO's Preliminary Response

Women in Informal Employment: Globalizing and Organizing (WIEGO) is an international policy-research network with a long history of work in South Africa. A key focus of WIEGO's work is to monitor legislative practices and their impact on livelihoods internationally. Our assessment of the Licensing of Businesses Bill is that it is far behind good practice precedent at the global level regarding small business licensing. In this preliminary response to the Bill we outline a number of key concerns. We welcome further engagement with your department on this issue.

1. Summary of the Bill

The Bill specifies that any person involved in business activities – no matter how small – will be required to have a licence. They will have to lodge an application for a licence to the licensing authority and pay a fee of an unspecified amount. (If the applicant is a foreigner, he or she will have to have a valid business permit.) If the licence is granted, it will be valid for a period of five years. The licensing authority will be the local authority. Section 17 (revocation, suspension of a licence), 18 (automatic revocation of a licence), 19 (fronting practices), 22 (amendment of licence by licensing authority on its own discretion) gives the licensing authorities discretionary powers to amend, suspend and revoke a license. Members of the South African Police Service, traffic officers and peace officers, among others, will be given powers to monitor and enforce compliance to the Act. They are empowered to conduct inspections, question any person, remove any goods on the premises and confiscate them and close any premises pending further investigation. Those found in contravention of the Act, once convicted, will be liable for a fine (of an unspecified amount) or imprisonment for a period of up to ten years¹. This is a new piece of legislation that replaces the 1991 Businesses Act.

2. Key concerns with the Bill as it is currently formulated

The central purpose of the Bill contradicts the content. It is difficult to assess exactly what the state aims to gain out of this. The preamble to the Bill states that it will 'provide a simple and enabling framework for procedures for application of business licenses by setting national norms

¹ The Act in fact states 'for a period not exceeding ten (10), or both...' so does not specify the period. Zodwa Ntuli, the DTI Deputy Director General stated that the period is 10 years (MoneyWeb, 25 March 2013).

and standards'. The Minister's statements about the bill are informative. 'Davies stressed that the Bill is put in place to deal with illegal traders and semi-illegal practices taking place in South Africa' (Citizen, 21 March 2013). He mentioned illegal imports, sub-standard goods, counterfeit goods, drug and illegal liquor trading. These issues are in fact dealt with through other laws like the Customs and Excise Act of 1964, the Foodstuffs, Cosmetics, and Disinfectants Act of 1972, Counterfeit Goods Act of 1997, Drug and Drug Trafficking Act of 1992 and a raft of provincial level legislation aimed at regulating (through the issuing of licences) informal liquor outlets or shebeens. As outlined later in this submission many in the informal economy would welcome a simple and enabling framework for registration / licensing. To achieve this however major changes would need to be made to the existing Bill.

The effect of the Bill is to criminalize those working in the informal economy. Ironically, unlike its predecessor - the 1991 Businesses Act², this Bill is devoid of any developmental content. The new Act is largely punitive and will result in large scale criminalising of current livelihood activities. Informal operators – particularly those operating in public space – across the country are currently constantly harassed by local authorities. In a recent set of interviews with Durban street vendors for example, police harassment was identified as one of the two primary factors hindering traders work. Confiscation of goods is widespread and often has devastating implications for livelihoods. The Bill gives wide ranging discretionary power to both the licensing authority and inspectors and is likely to intensify this trend. The Bill suggests no upper limits on the fines charged. If the Department of Trade and Industry's Deputy Director General's statement is correct, someone found guilty of contravening the Act could be imprisoned for as long as ten years. Those creating their own employment should not be treated as criminals even if they are unlicensed. This is an administrative rather than criminal matter and violations should be treated accordingly.

A further effect of the Bill will be to fuel xenophobia. Foreign migrants play an important role in South Africa's informal economy – for example they often employ South Africans and distribute affordable food to poorer consumers. The Bill states only foreigners who have a *business permit* will be granted licenses. Business permits have to be applied for in the country of origin and are only granted if the person applying can guarantee that they have R2.5 million to invest in South Africa. Few if any foreigners currently operating in the South African informal economy will qualify. The Bill also suggests that community based organisations, non-governmental organisations and others will be given the job of working with the licensing authorities to police this. As the Migration specialist Crush noted on this clause in the Bill 'This sounds suspiciously like an attempt to get South Africans on board to assist the police in identifying and rooting out foreign traders'. He goes on to say 'As the tragic events of May 2008 (referring to the xenophobic attacks) illustrate, there are elements in many communities who need no encouragement to turn on their neighbours from other African countries.' (Business Day, 15 April, 2013).

There are major concerns about the practicalities of implementing this proposed legislation. In final quarter of 2012 Statistics SA registered 2 205 000 people working in the informal sector³. The majority of these people are not currently registered. The practicalities of implementing a blanket licensing process on already overstretched local authorities are concerning. Further the Bill establishes multiple limitations on licensing so imposing high administrative costs on the licensing

² Section 6 of the 1991 Act, for example, outlines in detail how street trade can be regulated.

³ Stats SA defines the informal sector as follows 'The informal sector has the following two components: i) Employees working in establishments that employ less than five employees, who do not deduct income tax from their salaries/wages; and ii) Employers, own-account workers and persons helping unpaid in their household business who are not registered for either income tax or value-added tax.' (Stats SA, 2013: xxi)

authority. Enforcement will be costly. In addition the discretionary power granted is so broad that it will undoubtedly generate an enormous case load for the courts.

The consultation process has been very limited. This is a new Bill not an amendment to the 1991 Businesses Act and thus a significant new development. It is unclear what process preceded the development of this new legislation. The unit within the Department of Trade and Industry responsible for developing a National Informal Business Development Framework was only aware of the Bill once it was released for public comment. Similarly local authorities – who will be the implementing agency of this proposed Bill – are also unaware of it. The process to get input from the public is very limited. Cabinet has set a tight timeframe – 30 days. There are no portfolio committee hearings nor are provincial hearings scheduled. Finally a bill with such serious implications for the economy should be discussed at National Economic Development and Labour Council (NEDLAC).

Research on the informal economy suggests that many informal operators, particularly street vendors, would welcome the recognition that licencing or registration might bring. There however has to be a balance between incentives to register (and protection this might offer) and sanction. In the Bill there is no mention of benefits that might accrue from becoming licensed, with the emphasis being almost entirely on sanctions. The Brazilian 2008 Law of the Individual (Sole) Micro Entrepreneur (MEI) is an example of an approach that encourages informal entrepreneurs to come "inside the system". The registration is free (no documents required), exempts the entrepreneur from federal tax and sets municipal tax at a nominal rate. On registration the applicant is immediately issued with a trade number (CNPJ) and registered with the Board of Trade. Among the advantages is that having a CNPJ number facilitates the opening of a bank account, loan requests and invoice issuance. Registration enables access to state social security benefits such as maternity-leave, sick-leave and retirement benefits. If they hire an employee the law requires that they pay the minimum wage, so protecting employees.

3. Specific elements of the Bill that warrant changing (preliminary observations):

3.1 Targeting foreigners:

To avoid discrimination and in recognition of the role foreigners play in South Africa's informal economy, foreigners should not be required to submit any additional documentation. Section 6 (1)e on page 10 and Section 24 (a) on page 15 should thus be removed.

3.2 Simple and accessible licensing processes:

As noted the Bill imposes high administrative costs on the licensing authority by establishing multiple limitations on licensing – so that enforcement will become costly. Instead, the provisions of the bill should make the licensing of business at any scale (however small) as simple and accessible as possible for the largest segment of the population possible, and they should make the conditions for licensing as costless to enforce as possible. To that end:

Application for a license

-- Page 10, Section 6 (1): The requirements for lodging an application must not assume an ability to read and write, fill out complex forms, speak a certain language, or undertake an onerous commitment of time and other resources. In particular:

-- To implement (1)(a) the relevant government office should provide mobile services to reach the population of business operators that may not have the resources to make an appearance at the central office.

-- (1)(b) the prescribed manner and form must be accessible and achievable for all segments of the population

-- (1)(d) The prescribed application fee must be nominal and accessible for all segments of the population

The licensing authority should issue a dated receipt for the application and this receipt should serve as a temporary license until the application is approved or denied.

3.3 Reducing discretionary powers:

Revocation, suspension of a licence

Page 12, Section 17: this section should be removed from the bill as it grants unlimited discretionary power to the licensing authority to arbitrarily revoke licenses.

Automatic revocation of a licence

Page 13, Section 18: this section must place the burden of proof on the licensing authority, not the business person – so that it reads "the licensing authority may not, without complete and certified documentation, revoke a license or order any person to stop trading." As written this section also establishes unlimited scope for employment-stifling abuse of authority.

Fronting practices

Page 13, Section 19: this section will become unnecessary if the requirements for licensing are made simple and accessible to all applicants, regardless of means.

Transfer of a licence

Page 14, Section 21: this section will also become unnecessary if the requirements for licensing are made to be simple and accessible to all applicants, regardless of means. It will also reduce administrative costs to the licensing authority.

Amendment of licence by licencing authority on its own discretion

Page 14, Section 22: again this section grants unlimited discretionary power to the licensing authority and creates the conditions for abuse of authority as well as imposing administrative costs on both the licensing authority and the licensee. Business licenses should not be amended once they are issued and conditions should not be attached to the license other than the requirement to sell legal goods or perform legal services. Place of work should be regulated through a statutory bargaining forum at the city level and should not be limited through the business licensing mechanism.

Disqualifications and Prohibitions

Page 15, Sections 24 and 25: These sections should be written to support existing livelihoods to the extent possible, so as to meet national employment goals

3.4 Penalties for non-compliance:

Closing down of licenced premises

Research shows that confiscation of goods has devastating livelihood impacts – setting business activities back by many months and in some cases destroying them altogether.

Page 16, Section 26: this section grants unlimited discretionary power to the licensing authority and establishes the conditions for abuse of authority as well as imposing administrative costs on the licensing authority, the licensee, and the court system – as the scope for abuse of authority in this provision is so broad that its use will undoubtedly generate an enormous caseload for the courts. This section should be removed.

Penalties

While the 1991 Businesses Act (Section 5) states that those contravening the Act's provisions will be liable to pay 'a fine not exceeding R1000 or imprisonment for a period not exceeding three months' this Act imposes no such limits. Those contravening the Act's provisions should be liable to pay a fine and an upper limit should be set at a rate that takes cognisance of the average monthly earnings of those involved in that segment of the informal economy. The amount should act as deterrent but also not destroy the business concerned. (Similar to the competition legislation.)

As noted above the sanctions for those guilty of criminal activities, for example selling counterfeit or substandard goods (like illegal cigarettes or foodstuffs) or drugs are covered by existing legislation.

3.5 Participation of those working informally

Dispute resolution

Page 17, Section 29: traders and hawkers must be represented in the dispute resolution authority and must take part in the establishment of its rules and procedures.

3.6 Omissions

In any licensing or registration process due consideration should be given to incentives to register like access to social security benefits.

4. Next steps

This is a major new development that will impact on a critical component of South Africa's labour force. The current Bill needs to be fundamentally overhauled. In the first instance at the very least the period for public consultation needs to be extended and provincial hearings and parliamentary portfolio hearings arranged. The department then needs to reconsider its approach.

Caroline Skinner and Sally Roever⁴

On behalf of the international policy–research network – Women in Informal Employment: Globalizing and Organizing or WIEGO (www.wiego.org).

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⁴ Caroline Skinner is based at the African Centre for Cities at the University of Cape Town. She is WIEGO's Urban Policies Programme Director and can be contacted at caroline.skinner@uct.ac.za or 021 650 2057. Dr Sally Roever is WIEGO's street trading sector specialist. She is currently based in Washington DC and can be contacted on sally.roever@wiego.org.