

## **DRAFT BORDER MANAGEMENT AUTHORITY BILL**

### **COMMENTS BY BUSINESS UNITY SOUTH AFRICA (BUSA) TO THE PORTFOLIO**

#### **COMMITTEE ON HOME AFFAIRS**

*SEPTEMBER 2016*

### **Introduction**

BUSA is a confederation of business organisations including chambers of commerce and industry, professional associations, corporate associations and unisectoral organisations. It represents South African business on macro-economic and high-level issues that affect it at the national and international levels. BUSA's function is to ensure that business plays a constructive role in the country's economic growth, development and transformation and to create an environment in which businesses of all sizes and in all sectors can thrive, expand and be competitive.

As a principal representative of business in South Africa, BUSA represents the views of its members in a number of national structures and bodies, both statutory and non-statutory. BUSA also represents businesses' interests in the National Economic Development and Labour Council (NEDLAC).

### **General**

During the recent engagements at NEDLAC on the initial and subsequent version of the Border Management Authority (initially, Agency) Bill, BUSA consistently opposed the establishment of a new agency / authority for a number of reasons. The major change between the initial and subsequent version of the Bill is that chapter 5 and schedule 1 which dealt with the transfer of functions has now been deleted on the advice of the Chief State Law Advisor's Office that the approach initially proposed was unconstitutional. However, many of the reasons for originally opposing the Bill remain



in the version of the Bill presented to the Portfolio Committee. These are summarised below for convenience:

- The costs associated with the establishment of a new agency in a constrained fiscal environment. We are furthermore concerned that there is a substantial difference in the cost estimate provided for in the SEIA and that which has been communicated by the DHA.
- The fact that the findings and recommendations of the SEIAS commissioned by the Department of Home Affairs (DHA) have seemingly been ignored without adequate justification. This assessment recommended against proceeding because of the high risk and high costs associated with a wholesale transfer of functions. BUSA supported the recommendation made in the SEIA to establish the BMA as a co-ordinating agency only, without transferring the functions from the relevant line departments. No adequate reasoning was provided as to why this recommendation was discarded in favour of creating an implementing agency. BUSA agrees with the authors of that report that the establishment of such an agency is a high risk venture. We recognise the commitment of government to a risk mitigation strategy but are not convinced that the risk should be taken in the first place.
- BUSA notes that the primary thrust of the legislation is to combat the illicit movement of people and goods across borders. Whilst this is certainly a policy priority, and we recognise that there is a need to address this, we are concerned that the Bill confuses the combatting of illicit trade and migration with the promotion of legitimate trade and migration. The Bill in no way whatsoever seeks to promote legitimate trade or assist in facilitating the legitimate migration of people. In line with these comments, we are concerned about the negative impact that the militarisation of the border environment will have on legitimate trade and migration.
- BUSA believes that the risk of a negative impact on legitimate trade is high particularly given the fact that the process of implementing the new customs Acts has only just begun.
- BUSA further believes that functions related to trade facilitation such as customs and phytosanitary inspections conducted at ports of entry and exit will be harmed by the fact that the border officials will no longer be working under the supervision and instruction of the relevant line departments where the specialist expertise lies.



- It is considered paradoxical that a new agency is required in order to mend the lack of horizontal integration between different government departments at the ports of entry and exit, yet vertical integration between border officials and the relevant line departments is expected not to deteriorate if the border officials are separated from their parent line departments. If the ‘vertical’ relationship between the border officials and the line departments can be maintained through MoUs, service level agreements and an inter-ministerial committee, then why is new legislation required for horizontal integration at the border? Why can the current lack of integration between officials from different departments at the border not be resolved through MoUs, SLAs or an inter-ministerial committee?
- The separation between policy formulation and enforcement is considered problematic. Review of the functions to be transferred shows that functions that may be currently delegated to a front line staff member of a principal department does not remove the responsibility for the function from the senior official who remains in the principal department.
- Advice received by DHA from the Chief State Law Advisor’s office explained that the only way that functions can be transferred from the Minister currently responsible for the function is by presidential proclamation. We accept that this is a lawful process provided for in the Constitution, however, such proclamations are not subject to public consultation. Notwithstanding BUSA’s reservation in principle about transferring the functions, we were willing in the Nedlac process to engage on the schedule of functions to be assigned and provide comments as there were specific issues identified that must be dealt with. Now that the schedule has been removed and replaced with the process of presidential proclamation, BUSA will have no forum to raise these specific issues as the process provided for does not pass through Nedlac or Parliament - nor does it provide for any mandatory public consultation or prior publication. These specific comments included, but were not limited to:
  - Given the original approach in the Bill which in BUSA’s view proposed transfer of a number of functions which in fact were undertaken outside the border law enforcement area or could be exercised concurrently within or outside of the border law enforcement area. We were concerned that a transfer of those functions will also affect the exercise of those functions within the country and not just within the border law enforcement area. The advice of the Chief Law Advisor is that amendment of the



principle legislation may not be required as the relevant powers will be undertaken concurrently, however we have our reservations as to the accuracy of this given the complexity of certain legislation. Moreover, Business' general experience with concurrent powers is that it reduces efficiency.

- Many of the powers transferred are powers which specific laws confer upon the highest administrative authority within a line department, which he or she then delegates to officials. By transferring this function to the BMA wholesale, the administrative authority in the line function will not be able to exercise oversight functions.

Several other concerns were raised regarding legislation identified in the schedule. Once the schedule has been removed, BUSA has no indication whatsoever regarding which functions are to be transferred and which not. This makes it impossible for us to express a view as we do not know which legislation it is that the administration of which will be transferred via proclamation. And as stated, we may now not have a platform to raise these specific concerns.

- Clarity provided by DHA that there will be two risk management units for trade; one the existing unit in SARS and the new one in the agency is welcome in that it is now understood that there will be two risk management units for trade. Risk management in trade is largely a pre-border control activity, which is taken outside the border control area. It remains unclear however what the relationship between the two risk management units will be. It is a significant concern that traders may be subjected to two different risk assessments, which cannot be acceptable. There also appears to be an intention to have SARS staff (in addition to the customs control officers that will be transferred) operating at the risk assessment unit at the border.
- BUSA fully supports the view expressed by the Davis Tax Committee in respect of the transfer of SARS functions to the BMA, namely that “to put so significant a contribution to the fiscus in a position of uncertainty [if the Bill were to be implemented] is fiscally imprudent at this critical juncture for the South African economy”.



## **Detailed Comments**

### 1. Agency Creation

In the Socio-economic Impact Assessment Study (SEIAS) commissioned by DHA on the draft Bill, the establishment of a Border Management Agency was determined to be a substantially less cost effective option than capacitating the SANDF to perform the function (R15 – 24 billion as compared to projections of R2.5 billion for the SANDF to perform the function). In the current constrained fiscal environment, with the prospect of an imminent sovereign debt rating downgrade, the fiscal space for the establishment of the BMA is simply not available. DHA has provided no information on the funding required for the establishment of the BMA. BUSIA believes that availability of the necessary funding for the establishment of the BMA should be clarified well before its establishment.

In addition, the key challenges that the Bill purports to resolve all relate to the movement of people rather than the movement of goods. Whilst BUSIA acknowledges that there are serious challenges relating to the illicit movement of goods, measures to combat illicit trade should not be at the expense of efforts to facilitate legitimate trade. The Bill in its current form does not contain any measures to promote the latter. Different resources and solutions are required to regulate the movements of goods vs. people. BUSIA therefore is of the view that the functions relating to the movement of goods and people should be kept separate, and functions relating to the movement of goods should not be assumed by the proposed BMA. Additional funding and resourcing for the existing model appears to be the solution to many of the challenges experienced in border management. Furthermore, the integration being sought by DHA should be possible within the existing framework consisting as it does of line departments representative of a single government. We would furthermore like to state for the record that BUSIA is in favour of the recommendation made in the SEIA to establish a BMA solely for the purposes of coordinating the various line departments in the border law enforcement area, but not to assume their respective functions.

### 2. Movement of people vs. movement of goods / customs functions

BUSIA is concerned that the proposed BMA will not have the necessary financial and human resources to facilitate the movement of legitimate goods. This is in contrast to SARS, which is highly



efficient in managing the cross border movement of goods. The integration of SARS' risk profiling systems into the BMA will also prove highly challenging, with consequent possible disruptions to trade.

### 3. Absorption of functions

BUSA is of the view that DHA has underestimated the logistical, financial and legal difficulties inherent in absorbing the various law enforcement related functions into the BMA. Whilst the BMA is understood to be an implementing authority, many of the functions which the BMA is envisaged to perform are captured in legislation where no distinction is made between enforcement in the border area and the rest of the country. The principal legislation would in many instances need to be amended as a simple assignment of functions will result in significant legal complications. Put simply, once a function is assigned to the BMA, what will happen to the portion of the provision that does not concern the border law enforcement area? The current situation of vertical integration of specialist decision making in line departments with responsibility for the cross border movement of goods will no longer exist, leading to likely complications in carrying out these functions.

### **Specific Proposals**

Notwithstanding BUSA's principle objections to the establishment of the BMA as outlined above, the Bill in our view would benefit from the following proposed amendments:

#### 1. Chapter 8: Committees and Implementation Protocols

BUSA is concerned that other organs of state may continue to undertake duplicate inspections once cargo has been moved from the border law enforcement area, thereby hampering legitimate trade. BUSA therefore proposes the insertion of the following provision as section 28 (5):

“establishing systems, forms, procedures and protocols to ensure that each organ of state does not duplicate the execution of functions carried out by any other organ of state in respect of a person affected by this Act”

## 2. Chapter 6: Powers of Entry, Search and Seizure (Routine Searches)

BUSA disagrees with Section 20 and proposes that the same test applied in Section 19 should also be applied in relation to routine searches; namely that officials should only be permitted to search goods and persons should there be reasonable grounds that a warrant is likely to be granted if applied for, and that the delay in applying for such a warrant would defeat the object. BUSA is of the view that omitting such a test would create the possibility of abuse as officials would be permitted to search and seize items without any reasonable suspicion on the basis that it is a 'routine' search. This approach opens the door for victimisation, inconsistent application and abusive practices. BUSA therefore proposes the insertion of a new Section 20 (2) and 20 (3) as follows (with consequential amendments to subsequent numbering):

*“20 (2) “The written authorisation referred to in section 20(1) above shall at all times be available for such roadblock and be accessible for inspection by the public. The written approval must state the following:*

- (a) The date on which the roadblock is authorised*
- (b) The approximate duration of the roadblock; and*
- (c) The place and object of the proposed action”*

*BUSA believes that the above insertion would align the Bill with Section 13 (a) and 13 (b) of the South African Police Services Act, 1995 (Act No. 68 of 1995).*

*20 (3) “An officer may, without a warrant*

- (a) conduct a routine inspection or search of any person, goods, documents, premises, or vehicle within the border law enforcement are or at a port of entry for the purposes of ascertaining compliance with the provisions of this Act, provided the officer on reasonable grounds believes that-*

- (i) a warrant will be issued if applied for; and*

- (ii) *the delay in obtaining the warrant is likely to defeat the object of such warrant.* ”

### 3. Chapter 9: General (Review and Appeal)

BUSA believes that written reasons for decisions should be provided and should meet certain criteria. BUSA therefore proposes the insertion of Section 30 (6) as follows:

- “ (1) *Every decision of the Commissioner must be in writing and be*
- (a) *consistent with the Constitution and all applicable laws;*
  - (b) *in the public interest;*
  - (c) *within the powers of the Authority, as set out in this Act*
  - (d) *taken within a procedurally fair process in which affected persons have the opportunity to submit comments and present relevant facts and evidence to the Commissioner; and*
  - (e) *based on reasons, facts and evidence that must be summarised and recorded; and such factual and legal reasons must be explained clearly in the written decision.*
- (2) *Any decision of the Commissioner and the reasons therefor must be made available to the affected party.*

*BUSA proposes that the Section on Appeals be amended to include an independent appeal body. In respect of claims for damages only being possible through the courts, BUSA is aware of other legislation which allows for Consent Orders to be confirmed by an independent appeal body and that such Consent Orders may include an award of damages to the complainant provided that both parties agree. In other legislation, Consent Orders refer to when both parties to the dispute agree to the proposed terms of an appropriate order after the matter has been resolved through:*

- (a) The ombud;*
- (b) Alternative dispute resolution agent;*
- (c) Agreement between the National Credit Regulator and the respondent; or*
- (d) Agreement between the Competition Commission and the respondent, as the case may be.*

*The Tribunals, established in terms of the legislation referred to above, confirm the appropriate order, on the terms agreed between the parties. Once the parties have agreed to a Consent Order and it has been confirmed by the Tribunal, no party may afterwards commence an action in a civil court for the assessment of the amount or awarding of damages. BUSBA is therefore of the view that a similar “Consent Order” concept, and other dispute resolution processes could be built into the BMA Act. In this regard, wording for the dispute resolution provision is proposed as section 30(7), as follows:*

- (1) A person aggrieved by a decision of the Commissioner, an officer or an official to which this section applies, or has any other dispute in terms of this Act, may apply in writing to the Commissioner to have the matter resolved through alternative dispute resolution procedures.*
- (2) The Commissioner must consider an application in terms of sub-section (1), and refer a matter for alternative dispute resolution only if-*
  - (a) the decision is appropriate for alternative dispute resolution;*
  - (b) the Border Management Appeal Board has not already considered the decision on appeal; and*
  - (c) the decision is not subject to any judicial proceedings or pending judicial proceedings.*
- (3) The Commissioner must refer all appropriate disputes for resolution by mediation or conciliation to the ADR division of the Border Management Appeal Board or a Mediator accredited by accreditation agencies as determined by rule.*

- (4) *If the Border Management Appeal Board, or an accredited Mediator, to whom a matter is referred for alternative dispute resolution concludes that either party to the conciliation or mediation is not participating in that process in good faith, or that there is no reasonable probability of the parties resolving their dispute through that process, the Border Management Appeal Board or accredited Mediator must issue a certificate in a prescribed form prescribed stating that the process has failed, where after it will be referred for determination by the Border Management Appeal Board.*
- (5) *In the event that the matter is referred to the Border Management Appeal Board in (4) above, the Border Management Appeal Board may;*
- (a) Dismiss the appeal; or*
  - (b) Set aside the decision and replace it with a suitable, alternative decision; and*
  - (c) In the event that the appellant suffered injury or damage as a result of the decision overturned, refer the matter to court for the quantum of the compensation to be determined. Such a referral must be accompanied by a copy of the Appeal Board's finding.*

*Furthermore, in respect of consent orders, BUSBA proposes the insertion of a new section 30(8) as follows:*

- (1) *If a matter has been –*
- (a) resolved through an alternative dispute resolution process agent;*
  - (b) determined by the Border Management Appeal Board [or the Commissioner], and an appropriate settlement to compensate for damages arising from the determination has been agreed between the disputing parties; the Border Management Appeal Board or a court, without hearing any evidence, may confirm that resolution or agreement as a consent order.*
- (2) *With the consent of a complainant, a consent order confirmed in terms of this section may include an award of damages to the complainant.*



*(3) A person who has suffered loss or damage as a result of any matter governed by this Act which the Border Management Appeal Board has jurisdiction to determine, may not commence an action in a civil court for the assessment of the amount or awarding of damages if that person has consented to an award of damages in a consent order.”*

### **Conclusion**

For the reasons articulated above, BUSA has serious misgivings about the establishment of a Border Management Authority. The reasons for this are primarily due to the inherent risks involved in possible disruptions to legitimate trade and the demands on a very constrained national fiscus. BUSA believes that certain of the legitimate concerns expressed by DHA relating to the movement of people can and should be resolved through the existing structures and mechanisms or through the establishment of a coordinating entity as recommended in the SEIA. Given the inherent risks involved to the country in a financial and economic sense, caution should be exercised for the foreseeable future in considering any legislation that increases these risks.