Report of the Portfolio Committee on Trade and Industry on the *Intellectual Property Laws Amendment Bill* [B 8 – 2010] (National Assembly – sec 75), dated 16 September 2011:

The Portfolio Committee on Trade and Industry, having considered the subject of the ***Intellectual Property Laws Amendment Bill*** [B 8 – 2010] (National Assembly – sec 75), referred to it and classified by the JTM as a section 75 Bill, presents a redraft of the Intellectual Property Laws Amendment Bill [B 8B – 2010].

An amendment to the Preamble proposed by the Freedom Front Plus while finalising the Bill in relation to indigenous communities and indigenous knowledge was rejected on the basis that it was already included in the Preamble.

Three minority views were expressed as indicated below:

Democratic Alliance (DA)

"1. *The Sui Generis Option*

It must be noted that the DA believes that we should be legislating to protect Traditional Knowledge but maintains that this should be done through *sui generis* legislation rather than an amendments to the four main existing IP laws.

The majority of Intellectual Property experts who appeared before the committee support this view. The World Intellectual Property Organisation also broadly endorses it.

2. *Referral to the House of Traditional Leaders*

It is clear that the Bill needs to be referred to the House of Traditional Leaders in terms of Sec 18(1) a of the Traditional Leadership and Governance Framework Act 2003 because it clearly "pertains" to "customs of indigenous communities"."

Inkatha Freedom Party (IFP)

"We cannot support this Bill for the following reasons

1. It should have been a *sui generis* Bill.

2. It did not serve before the National House of Traditional Leaders even though it pertains to the customs of traditional communities.

3. Insufficient consultations with the PC of Arts & Culture and Science & Technology.

4. The definition of knowledge lacks the requirement that such knowledge be unique to a relevant community and is not known or used by any other.

5. The definition indigenous community bypasses existing traditional councils.

6. An indigenous community as a legal person lacks the legal prescripts to determine how such entity expresses its volitions, *inter alia*, to appoint a representative or apply for registration of its knowledge.

7. The inclusion of extinct communities is absurd.

8. The Bill has undressed issues of constitutionality in that
    a. requires those who now freely use indigenous knowledge for commercial purposes to stop doing so until and unless they obtain the consent of a community and pay a royalty, thereby "taking away" a right without compensation
    b. the new royally or benefit to be paid to the Trust, which is an organ of state, is a tax, duty, levy, or surcharge, which turn this provisions into a money Bill.
    c. in the absence of extraordinary circumstances it is impermissible to legislate that money raised in terms of this Bill goes anywhere but in the National Revenue Fund

9. The Bill contravenes international law set out in the TRIPS which prohibits legislation which provides for national treatment or extends benefits to nationals only. Trying to achieve parity of treatment by means of additional international treaties subject to reciprocity confirms rather than solves the problem, as it highlights that in the absence of such treaties the TPIPS is breached.

10. The length of time during which indigenous knowledge is protected is excessive, unwarranted and not in line with any existing intellectual property law.

11. In spite of several requests we could not receive a mere 20 examples of existing items of indigenous knowledge which will be protected better by this Bill as compared to present legislation in respect of "derivatives" viz. actual performances, books, films and actual products, and received none.

12. The bill is unclear as which community can apply for protection, to what identifying elements is the protection extended or limited to, who represented the community, under which procedures is the representative selected and appointed, who will be able to freely use the knowledge both within and outside the community after registration and when and where, on what academic, factual historical or research bases are those questions to be answered and by whom, and in respect of many other crucial practical questions.

13. The Bill aims at (1) promoting traditional indigenous knowledge by protecting it and (2) give money to indigenous communities, which money can only come from domestic and international commercial sectors which will find it difficult to adjust to the departure from regular contract law provisions and dispute resolution mechanism contemplated in the Bill and will likely react by avoiding using anything remotely South Africans.

14. The Bill will create disputes between and among manly African clans and nations, while until now Parliament has avoided creating incentives for such type of disputes which may revive ancient animosities and feuds and set back the nation-building process, especially if there is money flowing from the application of this Bill.

15. Most questions relating to both the meaning and the application of the Bill cannot be answered without lawyers disagreeing, officials offering a different reading and legislators being confused. The Bill is a conundrum wrapped into an enigma surrounded by mystery looking at itself in a mirror".

Freedom Front Plus (FF Plus):

"The FF Plus fully supports the policy decision to give further effect to the rights contained in Sections 30 and 31 of the Constitution by creating mechanisms for the protection and promotion of the products emerging from indigenous people's culture.

However, it is our view that a *sui generis* approach should have been taken thus taking into account the uniqueness of the objects of protection, namely indigenous knowledge.

The FF Plus endeavoured to open that door by amending the preamble to the effect that will allow for future sui generis meta-legislation, however, that proposal was rejected even though the Chair requested such proposed amendment. The problem regarding this rejection relates to the inadequate time allocated to discuss the preamble and the elimination of any misunderstanding that might have arisen. Informally, where I explained the preample's logic, members did understand what was meant.

Very complex work has been done in a hurry and fundamental aspects have not been adequately dealt with, too many to enumerate here, but has been recorded during the Committee's deliberations. Certain progressive aspects also exists, therefore, the Bill does present a mixed bag of good and bad aspects.

In the final analysis, despite the huge efforts to make the Bill workable, it still falls short of the mechanisms needed that acknowledge indigenous knowledge as a unique protectable item.

South Africa could have made history by creating a new type of IP. However, the rushed nature of the process has resulted in a preclusion of this approach, which is unfortunate.

It now remains to be seen if and how the Bill will work in practice".

Report to be considered.

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Ms J L Fubbs, MP

Chairperson: PC on Trade and Industry

Date: 16 September 2011