



COMPULSORY REGISTRATION FOR NPOs?

By Ricardo Wyngaard

ABOUT NPO LEGAL ISSUES:

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The South African non-profit sector will soon have to revisit an important debate which sparked widespread controversy during the 1990s. The debate revolved around the question whether NPOs should be compelled to register in terms of the NPO Act. Voluntary registration eventually prevailed. The right of to freely associate which was protected by the new constitutional dispensation largely influenced this chosen path.

A report published recently has made important recommendations which will require South Africa to revisit this issue. The report was published by the *Financial Action Task Force* and the *Eastern Southern Africa Anti-Money Laundering Group* and is entitled: *Mutual Evaluation Report - Anti-Money Laundering and Combating the Financing of Terrorism* (the report).

The report reviews, amongst other, the exposure of NPOs to risks involving terrorist financing and the adequacy of South African laws and regulations in dealing with this. It concludes that South Africa has not assessed potential risks of terrorist financing posed within the non-profit sector and it has not conducted any outreach programme to protect the non-profit sector against terrorist financing abuse. Recommendations to tackle this include:

- Legislation should make provision for mandatory registration of NPOs.
- Enforcement powers under the NPO legislation should provide for the power to sanction office-bearers, impose fines and freeze accounts of NPOs for violation of oversight measures.
- NPOs should maintain information on the identity of board members for a period of at least five years.

The risk of terrorist financing is no doubt an important issue, but it is questionable that compulsory registration is a proper and ideal solution in the South African context. The motivation for compulsory registration is captured as follows in the report:

“The voluntary requirement for the registration of NPOs under the NPO Act undermines the transparency and accountability in the way that NPOs collect and transmit funds in South Africa and creates a loophole that increases the risk of abuse of unregistered NPOs by terrorist financiers.”

This motivation is flawed in my view. Voluntary registration does not automatically increase the risk of abuse of unregistered NPOs. An unregistered NPO will only be able to open a bank account if it complies with the verification procedures laid down in the Financial Intelligence Centre Act (FICA). Without a bank account an unregistered NPO will find it difficult to ‘collect and transmit funds’. FICA places an obligation on banks to report any suspicious transactions to the financial intelligence centre. No loophole is accordingly created through voluntary registration process.

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This means that compulsory registration, in terms of the NPO Act, would not significantly reduce the risk of terrorist financing. Compulsory registration would however pose more significant risks for the independence of the non-profit sector. South Africa's own history has shown how compulsory registration under the notorious Fundraising Act was used as an instrument to target more progressive organisations.

Some of the recommendations contained in the report are also un mindful of the capacity constraints within the NPO Directorate. An impact assessment commissioned by the Department of Social Development, published in January 2005, found that:

"the resources and implementation capacity of the NPO Act is severely lacking".

Although there has been some attempt by the Department of Social Development to increase the resources for the implementation of the NPO Act, it remains insufficient. The NPO Directorate is still struggling with a backlog of applications for registration.

More than ten years after the NPO Act has come into operation we are faced with the haunting question whether NPO registration should become compulsory. This question is presented by voices outside the borders of South Africa.

A more appropriate question to consider at this time is:

What can be done to give more meaningful effect of the noble objectives contained in the NPO Act?

INCREASED REGULATION OF INTERNATIONAL NGOs IN SA

By Ricardo Wyngaard

Several International NGOs (INGOs) are operating in South Africa. Unlike in some other countries, South Africa's legal system is not hostile to INGOs having branches in South Africa. In spite of this, there are still a number of legal and other issues to take into account when INGOs decide to operate in South Africa.

Recent amendments to the Income Tax Act have allowed foreign non-profit entities to access tax exemption in South Africa. This is subject to two conditions: *firstly*, that such foreign entities qualify for tax exemption in the country where established and, *secondly*, upon termination of its activities in South Africa it must transfer its local assets to a local public benefit organisation (or a prescribed institution) if more than 15 percent of its local receipts and accruals came from a source within South Africa. Foreign non-profit entities are not required in terms of the Income Tax Act to be registered in South Africa to have tax exemption.

Another, less hassle-free, change to the legislation awaits INGOs when the Companies Act of 2008 (the Act) comes into operation. The Act was assented to by the President of South Africa on 8 April 2009, and can only come into operation on a date after 8 April 2010. External companies carrying on *certain* activities are required in terms of section 23 of that Act to register as an external non-profit company and maintain at least one office in South Africa. Acquiring interests in any property and entering into contracts of employment are amongst the activities that would require registration with the Companies Commission.

These two developments represent a move towards a more enabling environment for INGOs operating in South Africa whilst also commanding more accountability. INGOs operating in South African will have to pay close attention to a number of legal matters, including:

1. The legal status of the INGO in South Africa.
2. The procedure to register a branch in South Africa.
3. The applicability of labour laws when employing locals,

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