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11 November 2020

TO: THE ROAD TRAFFIC INFRINGEMENT AGENCY
PO BOX 6341
HALFWAY HOUSE
1 685
C/O: ADV QACHA MOLETSANE
Per: Email (AARTO.Comments@rtia.co.za)

AND TO: THE DEPARTEMENT OF TRANSPORT
PRIVATE BAG X 1 9 3
PRETORIA
0001
C/O: ADV. NGWAKO THOKA
Per: Email (AARTO. Comments@dot.gov.za)

Dear Sir/s,

IN RE: COMMENTS ON THE PROPOSED REGULATIONS TO THE ADMINISTRATIVE ADJUDICATION OF ROAD TRAFFIC OFFENCES AMENDMENT ACT, 4 of 2019.

A. INTRODUCTION:

1. The Organisation Undoing Tax Abuse (OUTA) is a proudly South African non-profit civil action organisation, comprising of and supported by people who are passionate about improving the prosperity of our nation. OUTA was established to challenge the abuse of authority, in particular the abuse of taxpayers' money.

2. OUTA is a strong promoter of road safety and effective traffic legislation. We believe that to achieve this outcome, South Africa needs effective and fair processes for the adjudication of road traffic infringements. Such processes must be consistent with the Constitution. In addition, it is critical that South Africa's traffic legislation is properly enforced to bring about behavioural

changes in road users and to ensure safer driving and fewer fatalities on our roads.

3. OUTA remains concerned about the high level of road fatalities in South Africa. We believe that these fatalities are largely due to poor enforcement of traffic laws, a lack of traffic infringement management and a variety of problems in the management of vehicle and driver licensing.

4. As a matter of principle, we do not oppose the introduction of new laws and regulations by Government, but rather wish to ensure that these laws and regulations are capable of effective execution and are aligned with the basic principles envisaged in our Constitution.

5. The Administrative Adjudication of Road Traffic Offences Act (AARTO) and the subsequent amendment thereto, is a troublesome and complex issue for most motorists and motor vehicle owners in South Africa and therefore OUTA, with the support and requests from its supporters wish to submit comments on the newly published draft Regulations.

6. We herewith will be commenting on two main issues identified in the proposed draft Regulations, published by the Minister of Transport for public comment on 02 October 2020. The two main issues are (a) the content of some of regulations and (b) the cross-referencing in the regulations.

B. CONTENT ISSUES:

7. Regulations 2(1), 2(3), 2(4), 2(5)(a), 2(5)(b), regulation 3, regulations 4(1)(a), regulations 5(3)(b)(ii), 5(3)(b)(iii), 5(3)(b)(iv), regulation 7(1), regulation 10(2), 10(3), regulation 11(8), 11(9), regulation 12(2), 12(4), regulation 13(2), 13(4), 13(6), regulation 15(3)(b), regulation 20(2)(c), regulation 21(5), 21(9), 21(10), regulation 22(2), 22(4), regulation 23(3)(b)(ii), 23(5), regulation 24(1)(b)(iii), regulation 25(3)(b), 25(4) and regulation 32(1), 32(2), 32(5), refer to regulation 33(4), which states the following:

"33(4) An infringement notice or AARTO notice required to be served or issued to the infringer must be issued or served by –

(b) electronic service through electronic communications network the details of which have been provided by the infringer in terms of regulation 32;"

7.1 We believe that the service provision, as stated above does not provide for adequate service to infringers, given the serious nature of the consequences that may follow an infringement.

7.2 These forms of service are inadequate because it is likely that the notice will be missed by infringers in many cases. The email, SMS or voice message could easily be treated as junk mail or spam or could simply go unopened. There is nothing in this form of correspondence that emphasizes the importance of the document to the recipient.

7.3 Furthermore, the risk attached to these forms of service is unacceptable, given the serious consequences resulting from an infringer's non-adherence to the documents sent by electronic communication.

7.4 Therefore, it is critical to ensuring that an infringer is given an adequate opportunity to make representations or otherwise respond to an infringement notice (AARTO notice) before any penalties are visited upon him or her, which in the case of electronic communication does not give an adequate opportunity for the infringer to exercise this right accordingly.

8. In terms of regulation 2(6)(f), the regulation stipulates that certain information of the officer who issued the notice should be provided. With specific reference to regulation 2(6)(f)(i), an officer who issued the notice must provide his or her surname and initials on the notice, which was issued.

8.1 We fail to understand as to why an officer, who issues the notice is only required to provide his or her initials and surname, whereas regulation 2(6)(a)(ii) stipulates that the infringer must provide his or her first names, and if such

infringer has more than one name, at least the first two full names and the initials, including initials of any further names.

8.2 We therefore submit that we believe that the officer who issues the infringement should also provide his or her first names, and if such officer has more than one name, at least the first two full names and the initials, including initials of any further names.

9. Chapter 3 of the regulations deals with the Appeals Tribunal. We herewith submit the following comments with regards to the Appeals Tribunal:

9.1 The functions of the Appeals Tribunal include the adjudication of matters brought to it by infringers aggrieved by a decision taken by the representation officer and the hearing of appeals against, or review of, any decision of the representation officer, that may be referred to the Appeals Tribunal.

9.2 This Appeals Tribunal will have jurisdiction over the entire country. The Tribunal consists of a Chairperson and only eight members, who are appointed on a part-time basis. It will not be possible for the Appeals Tribunal to deal with all the cases efficiently and within the prescribed time frames. The eight part-time members will respectfully not have the capacity or time to deal with tens of thousands of challenges, appeals and reviews.

9.3 Furthermore, it is not clear whether the Appeals Tribunal will be based in one location throughout the year (with infringers having to travel across the country to the Appeals Tribunal) or whether the Appeals Tribunal will go on circuit and hear matters at different locations (which means a significant amount of time will be lost to travel, further reducing the Appeals Tribunal's ability to deal with its caseload).

9.4 We are aware of the opinion of the creators of this administrative process, which believe that this type of process will assist in alleviation of congestion in the judicial system.

9.5 We are however of the opinion that by creating the Appeals Tribunal, it will produce even more congestion than there ever was in the judicial system. Further that the cost of establishing and sustaining this entity will be enormous and will be funded by normal South African taxpaying citizens.

9.6 Furthermore, The Amendment Act and subsequent regulations shifts from a default system of judicial enforcement of traffic laws through the criminal law to a compulsory system of administrative enforcement of traffic laws through administrative tribunals, administrative fines and a demerit points system.

9.7 Apart from the "offences" determined by the Minister, all contraventions of road traffic and transport laws will be treated as infringements which are subject exclusively to administrative enforcement under the Amendment Act and subsequent regulations by two national organs of state, the Road Traffic Infringement Authority and the Appeals Tribunal established by section 29A of the Amendment Act and regulated by regulations 8 to 11.

9.8 Regarding the aforementioned paragraph, section 156(1)(a) of the Constitution states that, a municipality has exclusive
executive authority in respect of the local government matters listed in Part B of Schedule 5. These matters include "traffic and parking". Therefore, the enforcement of traffic and parking laws must take place at a local level and cannot be usurped by national organs of state in the manner that the Amendment Act and the Regulations thereto purport to do.

9.9 We herewith submit that we are of the opinion that the entire procedure is cumbersome, convoluted, highly technical, costly and not accessible to ordinary South Africans and will not be able to be enforced within the context of South Africa's administrative systems and challenges.

9.10 We believe that this procedure does not in the slightest promote road safety but is clearly a money-making process. The simple reason being that ordinary South Africans will most probably elect to pay, even if they are not guilty of an infringement, than to participate in a process, that is nonsensical, in order to

avoid the administrative hassle. Perhaps this is part on the intention of introducing a cumbersome and onerous process.

9.11 Further to regulation 11, the regulation sets out specific timeframes applicable in the actioning of the process. We herewith submit that in the South African context, we do not believe that the timeframes, as identified, will be adhered to and therefore, further confirms our position that this administrative system will not be able to properly function, as it intends to do.

10. Regulation 20 together with section 26 (1) of the Act, regulates the disqualification and cancelation of documents and the manner in which an infringer must be informed that he or she has incurred more than the number of demerit points, as stipulated in these regulations.

10.1 According to regulation 20 the manner in which an infringer should be informed, can be by way of registered post, personal service or by way of electronic service (in terms of regulation 33(4)).

10.2 In contradiction to regulation 20, section 26(1) if the Act, specifically states that an infringer should only be informed by way of registered post. The regulations are thus contradictory to the act and the regulations cannot override the legislation. Regulations are always subordinate to legislation and cannot be used to amend legislation.

11. In terms of regulation 21(4), it makes mention of rehabilitation programs and the different types thereof. With specific reference to regulation 21(4)(c), it states that any other appropriate rehabilitation measures as approved by the Authority.

11.1 We are of the opinion that this regulation 21(4) is vague, due to the fact that it does not provide clarity regarding the process of adjudication of service providers. It further does not provide qualification criteria for possible service providers nor does it give clarity on what these “other appropriate rehabilitation measures” constitute.

12. Regulation 25 refers to the process in which an infringer may apply for a refund of penalties and fees paid. Regulation 25(4) stipulates that the Authority must consider the application and either refund the excess amount or refuse the refund.

12.1 This regulation does not clarify whether an infringer who has applied for the refund and the Authority has subsequently refused the refund, has the right to appeal or review the decision by the Authority to the Appeals Tribunal. It is not expressly stated, and we believe this warrants clarity from the Minister.

13. In terms of regulation 37(3), it states that AARTO 2 (Infringement Notices) must be obtained from the Authority and installed on electronic equipment used at the roadside for the electronic generation and printing of notices.

13.1 We again reiterate our stand with regards to the whole AARTO administrative system and wish to again state that we believe that this system is extremely costly and unmanageable. By creating regulations that places a duty on government (ultimately South African taxpaying citizens) to fund electronic equipment in order to enforce this system, is absolutely irrational.

13.2 Especially considering that the issuing officials are currently and according to other regulations, will in the future make use of the AARTO Notice Books. It is therefore inconceivable that additional money must be spent to buy electronic equipment that is most probably not even going to be used.

14. With regards to Schedule 2 of the draft regulations, we herewith make the following comments:

14.1 According to paragraph 3 of Schedule 2, it states that the penalty levy contemplated in regulation 36 (see our comments hereunder, in terms of cross-referencing issues) is payable on every infringement committed and followed up by all the process prescribed in the Act. This levy shall not be subjected to a discount referred to in column 4.

14.2 We respectfully submit that the amount of R100.00 to be charged as infringement penalty levy is completely excessive especially in the light of the fact that the Amendment Act proposes that AARTO Notices may be sent via electronic communication. It is unreasonable to charge an alleged infringer an amount of R100.00 for each electronic notice, even when the notice is sent erroneously.

14.3 Furthermore, we believe that the implementation of the infringement penalty levy does not at all promote road safety but is aimed at revenue generation, seeing that the cost of administration (which according to the RTIA is the purpose of the infringement penalty levy) was always included in the fine amounts.

14.4 Therefore, we strongly believe that the infringement penalty levy should be removed from the AARTO Amendment Act and its Regulations.

15. With regards to the newly published Schedule 3 of the regulation, we make the following comments:

15.1 According to column 4 of Schedule 3, it describes the classification of offences and infringements. We respectfully submit that the description is made in error, seeing that according to the AARTO Amendment Act, the classification of infringements into major and minor infringements have been deliberately excluded. Therefore, we believe that it will cause legal uncertainty if the description, as it currently stands, is implemented, and not amended to reflect the changes in classification according to the Amendment Act.

15.2 With regards to page 371 of the newly published draft regulation and moreover Schedule 3, we make the following comments:

15.2.1 We note that according to Schedule 3, charge code 4321 and 4322, it specifically states that if an infringer fails to comply with the directions conveyed by a road traffic sign by using an e-road without paying the toll charge, the

infringer will incur a penalty in the amount of R500.00 for a non-RWC (a Motor vehicles that do not need to display roadworthy certificates in terms of regulation 142 of the NRTR) and R1000.00 for a RWC (a Motor vehicles that need to display roadworthy certificates in terms of regulation 142 of the NRTR).

15.2.2 We acknowledge that the issuing of fines under AARTO for unpaid e-tolls are not new and confirm that OUTA has raised this problem with the previous version of the regulations.

15.2.3 These charge codes, which aim to enforce e-toll compliance, were never brought into effect and we again reiterate our stands that we do not believe that the AARTO Amendment Act and its subsequent regulations will be able to practically enforce these charge codes. It would require processing traffic fines and reminders for every unpaid gantry e-toll bill.

15.2.4 We herewith submit that the AARTO Amendment Act and its regulations are attempting to push water uphill by breath live in to an already collapsed and miserably failed e-Toll system.

15.2.5 Moreover, the South African National Road Agency Limited (SANRAL) is no longer considered to be an Issuing Authority, in terms of the AARTO Amendment Act and proposed Regulations, and as such, we fail to see how the enforcement of the aforementioned charge codes will be practical implemented. Keeping in mind that SANRAL processes over 2 Million e-Toll transactions a month, which if not paid will result in over 2 Million Infringement Notices being issued, only in the Gauteng area.

15.2.6 Furthermore, due to the fact that SANRAL is no longer classified as an Issuing Authority, how will the Agency or Issuing Authorities be able to ascertain the information of an infringer, who allegedly transgresses these charge codes and then issue them with the appropriate AARTO form.

15.2.7 We are of the opinion that AARTO, which is reliant on the E-NATIS system,

which contains many errors related to incorrect vehicle ownership details, contact details etc, which will give rise to a significant volume of problems when handling these large amounts of transactions each month and as such, will make the enforceability thereof virtually impossible. We strongly believe that legislation is only effective if it can be efficiently enforced and OUTA believes this is unenforceable and irrational.

16. With regards to Schedule 4 of the draft regulations, we herewith make the following comments:

16.1 We are of the opinion that Schedule 4 will not be able to withstand constitutional scrutiny. The reason being is that Schedule 4 aims at regulating and including members of the South African Police Service, as authorised officers, contemplated in section 1 of the act. Section 1 of the Act does not currently include members of the South African Police Services as authorised officers.

16.2 In essence, Schedule 4 is trying to amend legislation through regulation, which cannot be done in South African law.

16.3 Furthermore, Schedule 4 places a restriction and/ or limitation on the powers given to the South African Police Service through the Constitution of South Africa and other legislation.

16.4 The constitution expressly states in section 207 thereof, that the National Police Commissioner **must** exercise control over and manage the police services in accordance with the national policing policy and the directions of the Cabinet member responsible for policing.

16.5 In the event that Schedule 4 is promulgated, this schedule will directly interfere with the powers of the National Police Commissioner, because this Schedule will prescribe certain functions that must be executed by the South African Police Services in terms of the enforcement of the AARTO Amendment Act.

16.6 We therefore believe that the enforcement of the AARTO Amendment Act by

an already understaffed police force will not be possible and unless other alternative arrangements are made, we do not believe that the AARTO Amendment Act will be ready to be implemented Nation-wide.

C. CROSS - REFERENCING ISSUES:

17. Herewith our comments with regards to the cross-referencing issues. Although the newly published regulations are slightly better with regards to cross-referencing than the regulations published for public comment in 2019, it is still apparent that the drafting of the regulations was done in a hastily manner and not enough diligence was exercised when the regulations were drafted. The reason for our averment will become expressly clear and will be highlighted hereunder.

18. Regulation 7(2) makes specific reference to sub-regulation (1)(c). We herewith respectfully submit that no sub-regulation (1)(c) exists as it was excluded from the newly published regulations and therefore creates legal uncertainty with regards to the interpretation of the above-mentioned regulations, as the intention of the Minister cannot be determined.

19. Regulations 12(1) makes specific reference to Section 29B(2) of the Act. We herewith respectfully submit that no Section 29B(2) of the Act does not exists and therefore creates legal uncertainty with regards to the interpretation of the above-mentioned regulations, as the intention of the Minister cannot be determined.

20. Regulation 14(1) make specific mentioned to a monetary value as set out in paragraph (a) of Schedule 2. However, paragraph (a) of Schedule 2 does not exist and we believe that the correct reference should be to paragraph (1) of Schedule 2, the regulation creates legal uncertainty with regards to the interpretation of the above-mentioned regulations.

21. Regulation 14(2) make specific mentioned to column 7 of Schedule 3 relating

to the rand value payable in respect of a penalty. However, according to column 7 of Schedule 3 (as amended) it refers to Demerit points. We belief the correct reference should be to column 8 of Schedule 3 and therefore creates legal uncertainty with regards to the interpretation of the above-mentioned regulations.

22. Regulation 15(2) make specific mentioned to column 8 of Schedule 3 relating to the discounted penalty amount. However, according to column 8 of Schedule 3 (as amended) it refers to the rand value payable in respect of a penalty. We belief that the correct reference should be to column 9 of Schedule 3 and therefore creates legal uncertainty with regards to the interpretation of the above-mentioned regulations.

23. Regulation 18(1) makes specific mentioned to section 24(3)(a) of the Act, relating to the instances as to when demerit points are incurred by an infringer. We herewith submit that reference was wrongly made to section 24(3)(a) due to the fact that this section speaks to an infringer committing two different infringements on the same set of facts and not to the circumstances as to when demerit points are incurred by an infringer. The correct reference should be to section 24(2).

24. Regulation 18(2) only makes mention of column 6 of Schedule 3 relating to the demerit points to be incurred by an infringer. We belief that the correct reference should be to both columns 6 and 7 of Schedule 3 to avoid any legal uncertainty with regards to the interpretation of the above-mentioned regulations.

25. Regulation 18(3) make specific mentioned to column 9 of Schedule 3 referring to infringements or offences committed by an operator in terms of section 49 of the National Road Traffic Act. However, according to column 9 of Schedule 3 (as amended) it refers to the penalty minus the discount in rand value. We belief that the correct reference should be to column 10 of Schedule 3 and therefore creates legal uncertainty with regards to the interpretation of the above-mentioned regulation.

26. Regulation 18(3)(a) refers to column 10 of Schedule 3 setting out the charge code upon which an operator will be charged and also refers to column 6 of Schedule 3, relating to the amount of demerit points that would be incurred for those charges. We herewith submit that column 10 of Schedule 3 (as amended) refers to the Operator charge i.t.o section 49 of the National Road Traffic Act, 1996 and 6 of Schedule 3 (as amended) refers to demerit points: Persons who are not operators or juristic persons. We belief that the correct reference should be to column 11 of Schedule 3 and column 7 of Schedule 3.

27. In terms of regulation 18(8), this regulation refers to regulation 15(2). We submit that reference was wrongly made to regulation 15(2), seeing that regulation 15(2) refers to the discounted penalty amount, if payment is made within 32 days and does not refer (at all) to holders of foreign driving licenses, we belief that the correct reference should be to regulation 15(6) that does indeed refer to holders of foreign driving licenses.

28. In terms of regulation 21(5)(e), reference is made to regulation 18(6)(b). We submit that this regulation causes legal confusion regarding the intention of the Minister. The reason being is that regulation 21(5)(e) incorrectly refers to regulation 18(6)(b), seeing that the latter does not exist and that regulation 18(6) refers to the total number of demerit point which can be incurred by an infringer. We believe that the correct reference should be to regulation 18(7).

29. In terms of regulation 21(9)(a), reference is made to regulation 18(8). We submit that this regulation causes legal confusion regarding the intention of the Minister. The reason being is that regulation 21(9)(a) incorrectly refers to regulation 18(8), seeing that the latter refers to the holder of a foreign driver's license, which shall not incur demerit points. We believe that the correct reference should be to regulation 18(7).

30. In terms of regulation 33(4)(b), reference is made to regulation 32. We submit that erroneous reference was made to regulation 32, seeing that regulation 32 deals with the re-service of documents and not with electronic service through

electronic communications networks. The correct reference should be to regulation 31.

31. In terms of paragraph 1 of Schedule 2, paragraph 1 refers to column 6 of Schedule 3. We submit that erroneous reference was made to column 6 of Schedule 3, seeing that column 6 refers to Demerit points: Persons who are not operators or juristic persons. The correct reference should be to column 5 of Schedule 3.

32. In terms of paragraph 2 of Schedule 2, paragraph 2 refers to column 6 of Schedule 3. We submit that erroneous reference was made to column 6 of Schedule 3, seeing that column 6 refers to Demerit points: Persons who are not operators or juristic persons. The correct reference should be to column 5 of Schedule 3.

33. In terms of paragraph 3 of Schedule 2, paragraph 2 refers to regulation 36. We submit that erroneous reference was made to regulation 36, seeing that regulation 36 refers to the South African Police Service and not the penalty levy payable. The correct reference should be to regulation 35.

34. With reference to the aforementioned paragraphs and the manner in which these regulations were drafted, we herewith comment that the draft regulations make it very difficult to read and to interpreted, what the Minister's express intention was.

35. We humbly submit that urgent attention be given to correct the highlighted errors.

D. GENERAL COMMENTS AND CONCLUSION:

36. Notwithstanding the above-mentioned content and cross-referencing issues, which we have identified, we have also noted the following general issues and provide our comments thereto.

36.1 The current AARTO pilot project has been partially in force and in affect in the Johannesburg and Tshwane metros for the past 10 years, yet has still not yielded any conclusive positive results (in the event that the AARTO system is indeed aimed at road safety, as is claimed). With the Amendment to the Act and subsequently the publishing of these regulations, it is abundantly clear that the intention of the legislation and the regulations is to make money and not to promote road safety.

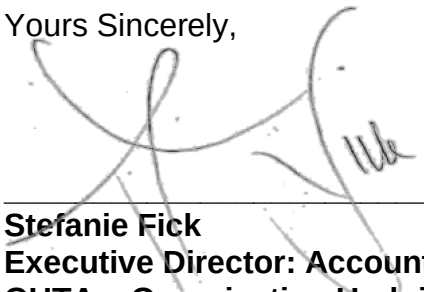
36.2 If the intention is to promote road safety, then why is the proposed administrative process and system aimed at generating money by creating a system that is not user friendly, complicated and cumbersome and in doing so forcing citizens to rather pay the fines instead of following the due process.

37. In conclusion we reiterate that, OUTA does not oppose the introduction of new laws and regulations by Government, but rather wishes to ensure that these laws and regulations are capable of effective execution and are aligned with the basic principles envisaged in our Constitution.

38. We trust that you find the above in order and thank you in advance for your consideration of our comments.

39. We reserve all our rights in this matter, as well as the right to amend, or to add to, these comments and to submit further comment should such a need arise as circumstances may require.

Yours Sincerely,



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