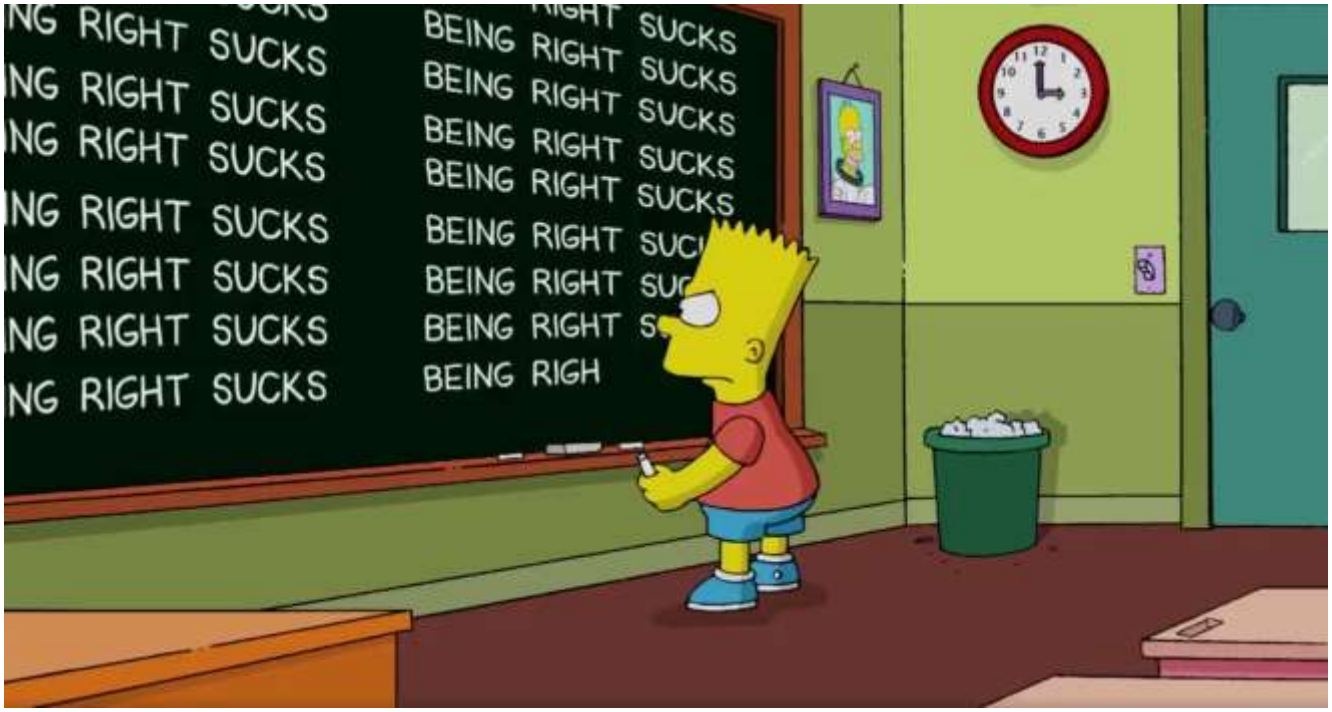
Fake Laws?

By Ian Cox



Recent correspondence with the Department of Environmental Affairs (DEA) has revealed that nearly every measure requiring public consultation that has been introduced into our law in terms of the National Environmental Management Biodiversity Act, 2004 or NEMBA may be unlawful. The reason for this is that it is looking increasingly likely that DEA failed to properly follow due process when introduced these laws to the public for consultation. In particular if failed to provide the public with sufficient information to enable proper consultation and also failed to publish the notice calling on the public to make representations properly.

The trout value chain has been complaining about the lack of information accompanying various drafts of the Alien Species Regulations for over a decade. I share that concern but have in recent years focussed on the failure to published consultation notices properly in a newspaper.

The obligation to strictly comply with the rules for publication is so longstanding and fundamental that lawyers tend to take it for granted that government will get the basics right. After all isn't checking procedure and ensuring compliance what civil servants are meant to do? If they are not getting that right, why employ them at all?

It was thus with some embarrassment and profound thankfulness that I received Martin Davies telephone call back in March 2014 telling me that he could not fine the notice calling for comment on the draft AIS regulations in a newspaper. I was grateful that he had alerted me to the obvious question whether this step had been taken and embarrassed that I had not thought to ask such an important and obvious question. Indeed no one had thought to do so in respect of any of the other versions of the Draft AIS relegations that were published for comment in 2007 and 2009. It seems that not a single lawyer anywhere in the country had previously thought to ask this question in respect of other environmental laws requiring public consultation.

So I made a mental note to ask the question when members of the trout value chain met with DEA in Pretoria a few days later. I did not for a moment think that we would be told that the official responsible for this did not believe publication was necessary. DEA's own lawyers, who were present quickly, debunked that idea. "The process is unlawful", Ilan lax and I told Dr Preston. "You will have to start again". "No we don't", said Dr Preston. "We'll publish a notice and at the same time extend the consultation period." "Not good enough", we replied. "The process is fatally flawed." I even wrote to DEA telling them as much. But we were ignored and so was planted one of the many bombs embedded in the AIS regulations that have made them the mockery that is the present law.

But even then I thought this was an aberration. It was only when members of the game ranching industry took our point and used it successfully to challenge the legality of the rhino horn moratorium that it began to dawn on me that the failure to advertise might be more widespread. This point was uppermost in my mind a few months later when I noticed with surprise that DEA has introduced a management plan for the Clanwilliam Yellowfish without me knowing about it. The plan was objectionable for a number of reasons not the least of which that it altered the meaning of words used in NEMBA and treated alien fish species and listed invasive fish species as if they are one and the same.

So I took a chance and asked if the draft notice had been advertised. It turns out that the notice calling for comments on this draft plan had also not been published in a newspaper as required by law. I took issue with DEA on this who told me that a failure to publish the notice in a newspaper did not invalidate the notice. I questioned the correctness that but conceded that the appeal process in the Rhino horn case would ultimately determine the outcome of that debate. I sounded this warning:

> "However it does now appear that the practice of not publishing draft notices of this nature in a newspaper in contravention of the applicable law is widespread in your department. Apart from these two cases there is are the AIS lists and regulations which were only published in a newspaper after I pointed out the omission at the stakeholder meeting that took place in Pretoria in March 2014. There is also the infamous "AIS clearance certificate" regulation that was deliberately snuck into the AIS regulations after the consultation process that I will say is undoubtedly unlawful.
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> How many notices are affected? Has DEA any explanation for the oversight? Is a process under way to rectify the omission? Has any attempt been made to consider the risk this poses to the legality of laws and regulations you have past?
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> These are matters of particular concern to me because I have complained for some time now that despite the numerous meetings your department has with stakeholders that it does not engage properly with stakeholders. This is an example of one type of improper engagement. Another is the failure to provide sufficient information. Examples of this are the failure to provide the risk and benefit matrix which informed the listing of each of the 559 invasive species is another as is the more recent refusal to make the contents of the MINMEC minute that we are told speaks to the acceptance by provincial and national environmental authorities of what has been agreed at Phakisa regarding trout. I know it is out of your jurisdiction but I am presently dealing with the refusal of an MTPA's official to reveal the reasons why the MTPA says biodiversity concerns require trout to be listed as

> invasive in areas where they already occur on the basis that they want to reveal this information on an as and when basis during "negotiations". The point is that the failure of your department to consult properly may be encouraging copycat behaviour from other environmental authorities.
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> The time may well be ripe for your department to undertake a critical re-evaluation in consultation with the public and stakeholders of what is required in the consultation process. I think you will find that much of what is presently happening is deficient. If I am right, and I think I am, then the legality of much of what you are trying to do is being compromised."

This was back in May last year (2016).

Nothing happened until January this year (2017) when I was notified out of the blue that DEA accepted that I was correct, that the management plan for the Clanwilliam Sandfish had been invalidly promulgated and that it would be withdrawn and re advertised. This was about two months before the Constitutional Court refused leave to appeal the Rhino Horn Moratorium Judgement which told me that DEA had by then accepted what should have been obvious from the outset, namely that a failure to properly advertise renders the law invalid.

So it should not be surprising that I wrote to DEA asking it to give details of the advertising of NEMBA notices generally. DEA asked me to be more specific which resulted in my letter of 27 June 2017. It not unexpectedly took DEA a while to respond to that letter but after some prodding they did on 12 September 2017.

That letter is very revealing. It turn out that DEA cannot find (read it wasn't done) advertisements published in newspapers for a great deal of the law making that has taken place under NEMBA these past 10 years or so.

We are talking of around half of every law that was promulgated and some of them are not inconsequential. It affects the Cites regulations, Amendments to the TOPS regulations and the National Biodiversity Framework.

But that is not the end of it. It seems that all of the notices that were published in newspapers after, sometimes well after, the 30 day consultation period had started running. In fact if you contend, as I do, that the notice should be published in a newspaper at the same time as it is published in the Gazette then you could justifiably say that nearly every notice of a proposed law was not published properly.

DEA disputes this saying either that notices did not require publication because they introduced non substantial changes to regulations or because the noncompliance was not material. But materiality depends on your point of view.

If you are an official who sees people as then problem and the consultation process as a tick box nuisance that has to be got through, then a failure to publish in a newspaper or to do so late sometimes over two weeks late, may seem to be immaterial piffle.

However if you approach is directed by the Constitution and the importance of the consultation process to our democracy and the development of a culture that respects human dignity, then you will see things very differently. Then this won't be seen as inadvertent error that can be condoned. It will be seen as evidence of a general contempt for and even an attack the Constitution and the rule of law.

Then there is the fact that DEA should be getting its law making right and not just almost right. Noncompliance should be the exception rather than the rule. It is not a new frontier good enough that creates a new and lower standard from which further acts of noncompliance will doubtless be measured.

I have written to DEA asking for more information. I am awaiting a reply to that letter.

But it does seem that the concerns I expressed back in May last year have merit. And when you realise that these same consultation requirements are found in many other environmental laws, is it not sensible to wonder how much of DEA's law making is real and how much is fake?
