Societies characterised by entrenched gender inequality or racially or ethnically defined wealth disparities are not likely to be socially and politically stable, particularly as economic growth can easily exacerbate these inequalities.

Seen from within this context, BEE is a vitally important policy necessary for the transformation of South African business and society as a whole, and for the long-term sustainable development of the country.

While the transfer of ownership and control of the economy to black persons is a critical part of the government’s BEE policy, it is only one aspect of the policy. BEE is also about ensuring that the people who work in, manage and lead South African businesses broadly reflect the diverse profile of the South African population, ensuring that skills are transferred to persons previously disadvantaged by the system of apartheid and that black business is developed through enterprise development strategies and affirmative procurement.

Bowman Gilfillan is itself committed to BEE and the transformation of the legal profession and has a long history, through its employment practices, of attempting to redress the inequalities which arose during the apartheid era. Bowman Gilfillan has now taken the lead in law firm transformation initiatives and has adopted its own Transformation Charter. This Transformation Charter addresses all aspects of transformation, including ownership, human resource development, enterprise development, procurement and corporate social responsibility.

Bowman Gilfillan has committed itself to train 50 black and 50 female lawyers to partnership level in the next 10 years.

In addition to being at the forefront of change in the legal profession, Bowman Gilfillan also provides comprehensive law services and legal expertise in all areas of BEE. Bowman Gilfillan has been involved in several groundbreaking BEE transactions and has advised major international commercial and industrial corporations, mining houses and banks in many areas of economic activity in the country. Some of the more recent BEE transactions we have been involved in include the following:

One of the legacies of apartheid is that South Africa has one of the most unequal distributions of wealth between white and black persons in the world. Allied to this are gender and racial disparities in education and skills levels, the under-development of black and rural communities, as well as a cultural gulf between racial and ethnic groups that has yet to be bridged. As the government’s National Strategy puts it:
<table>
<thead>
<tr>
<th>TRANSACTION AND PARTY/PARTIES REPRESENTED</th>
<th>DEAL VALUE</th>
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<tbody>
<tr>
<td>Advised Kagiso on its BEE transaction with Xstrata Coal</td>
<td>Value undisclosed</td>
</tr>
<tr>
<td>Advised ARM on its BEE transaction with Xstrata Coal</td>
<td>Value undisclosed</td>
</tr>
<tr>
<td>Advised Standard Bank in the implementation of its BEE transaction</td>
<td>R5 billion</td>
</tr>
<tr>
<td>Advised Deutsche Bank in the first BEE deal by an international investment bank</td>
<td>Value undisclosed</td>
</tr>
<tr>
<td>Advised Merrill Lynch in its BEE transaction, in which the BEE parties will acquire Merrill Lynch &amp; Co. shares listed on the New York Stock Exchange</td>
<td>Value undisclosed</td>
</tr>
<tr>
<td>Advised both Tongaat-Hulett and Hulett Aluminium in their recent BEE transactions</td>
<td>Combined value of R18 billion</td>
</tr>
<tr>
<td>Advised Reunert in its BEE transaction with Peotona Holdings</td>
<td>R1.1 billion</td>
</tr>
<tr>
<td>Advised Telwarisano (a BEE entity led by Dr Penuel Maduna), in its acquisition of 26% of the issued share capital of Sasol Oil</td>
<td>R1.5 billion</td>
</tr>
<tr>
<td>Advised ARM in the Avmin/ARM/Harmony merger</td>
<td>R10.8 billion</td>
</tr>
<tr>
<td>Advised in the Standard Bank/Andisa Capital BEE brokerage and treasury business acquisition</td>
<td>R120 million</td>
</tr>
<tr>
<td>Advised the Ubuntu-Botho Consortium in the Sanlam/Ubuntu-Botho BEE acquisition</td>
<td>R2.1 billion</td>
</tr>
<tr>
<td>Advised Afrox in the Afrox Health/Bidco BEE acquisition</td>
<td>R3.1 billion</td>
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<td>R3.8 billion</td>
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<tr>
<td>Advised Mvelaphanda in the Mvelaphanda Resources/Chamama Platinum BEE acquisition</td>
<td>R333 million</td>
</tr>
<tr>
<td>Advised the Stanlib/broad-based empowerment consortium (Safika, Nduna Trust and broad-based empowerment trust) acquisition of 35% of Stanlib</td>
<td>R352 million</td>
</tr>
<tr>
<td>Advised the Consortium after the buy-out by MTN management of Transnet’s 18.7% stake in MTN</td>
<td>R4.3 billion</td>
</tr>
<tr>
<td>Advised ARMgold in Harmony/ARMgold merger</td>
<td>R4.9 billion</td>
</tr>
<tr>
<td>Advised Metorex in relation to the disposal of its coal division, Wakefield Investments to Shanduka Coal, a subsidiary of Glencore</td>
<td>R425 million</td>
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<tr>
<td>Joint legal advisors to the PIC in its disposal to the Elephant Consortium of 6.6% of Telkom shares</td>
<td>R6.6 billion</td>
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<tr>
<td>Advised Merafe in Merafe/Xstrata asset for asset deal</td>
<td>R8.2 billion</td>
</tr>
<tr>
<td>Advised Murray &amp; Roberts on its BEE transaction</td>
<td>R400 million and R494 million</td>
</tr>
<tr>
<td>Advised Unisys on the disposal of a 30% stake in Unisys South Africa to a BEE consortium</td>
<td>Value undisclosed</td>
</tr>
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<td>Advised EDS in the sale of a 20% stake in EDS South Africa to the Koketso Gravitas Consortium and a 10% stake to a trust for black executive employees</td>
<td>Value undisclosed</td>
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<tr>
<td>Advised Alcatel in the disposal of a 25% share in Alcatel South Africa to the Four Seasons BEE Consortium</td>
<td>Value undisclosed</td>
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Many people who are interested in doing business in South Africa have heard about “black economic empowerment”, but most potential investors are confused as to what exactly this means. The first question we are always asked is, “Is BEE a form of nationalisation?” and the second, “Is BEE about giving away part of my company for nothing?” However, many South African businesses see BEE as a necessary strategy followed by government to ensure that black people (i.e. African, Indian and Coloured people) are given more of a stake in the economy. The National Strategy on BEE produced by the DTI states that BEE is underpinned by the following principles:

- BEE is “broad-based” - i.e. BEE seeks to deracialise all aspects of the South African economy and fast track marginalised communities into the mainstream;
- BEE is an inclusive process - it should empower as many people as possible;
- BEE is associated with good governance - BEE is also about improving the quality and transparency of all economic activity - it must be associated with the highest standards of corporate governance; and
- BEE is part of our growth strategy - BEE is about growth, development and enterprise development and not merely the redistribution of existing wealth.

BEE is a central part of the South African government’s economic transformation strategy. The formulation of policy and legislation to achieve BEE has been driven by the Office of the Presidency, together with the DTI. A multi-faceted approach to BEE has been adopted with a number of components which aim to increase the numbers of black people that manage, own and control the country’s economy, and to decrease racially based income inequalities.

The BEE Act

The BEE Act is the central legislation through which the BEE process will be managed. It does not set out offences or penalties relating to BEE performance but rather seeks, through the economic measures discussed below, to facilitate a uniform approach to BEE in the South African economy.

Thus, at the outset it is necessary to state that there is no “hard law” requiring that any entity in South Africa must meet specific BEE targets or must implement a BEE policy within the entity. However, from a practical perspective any company wishing to do business in the South African environment must consider and develop its BEE position. In addition to the pressures from government discussed below, an entity that does not have a good BEE rating, or does not strive to improve its BEE rating, will be hampered in the conduct of day-to-day business with government, organs of state and private-sector customers. Most private-sector businesses to which services are rendered or goods are sold will themselves have BEE procurement targets to meet and so the BEE rating of entities from which goods and services are procured will be a factor in determining who to do business with.

BEE is an issue that is taken very seriously by government in South Africa at present. Corporate restructurings and acquisitions are often seen as an opportunity to introduce a BEE component into the ownership structure of a business and any proposed transaction which does not include a component of BEE participation will be difficult to “sell” to government. In the regulatory approval process, the exchange control process and at various other stages in a transaction, government approvals will be required. In most instances, these approvals are discretionary and as such, the BEE element needs to be carefully considered.
The beneficiaries of BEE

The definition of who should benefit from empowerment has shifted in the BEE Act from the concept of “previously disadvantaged” to one of race. This shift makes it a lot clearer as to whom the intended beneficiaries are and removes some of the “artifice” and confusion which characterised the early BEE policies. The BEE Act defines the beneficiaries of BEE as “Africans, Coloureds and Indians”. These were the population classifications applicable under apartheid. This is a distinct departure from previous pieces of legislation that have allowed BEE to benefit white women or white disabled people, by targeting HDSAs, PDIs or HDIs.

As we state above, a multi-faceted or broad-based approach to BEE has been adopted by the government. The Act defines “broad-based black economic empowerment” as the economic empowerment of all black people, including women, workers, youth, people with disabilities and people living in rural areas through diverse but integrated socio-economic strategies that include but are not limited to:

- Increasing the number of black people that manage, own and control enterprises and productive assets;
- Facilitating ownership and management of enterprises and productive assets by communities, workers, cooperatives and other collective enterprises;
- Human resource and skills development;
- Achieving equitable representation in all occupational categories and levels in the workforce;
- Preferential procurement; and
- Investment in enterprises that are owned or managed by black people.

The BEE Act and the “broad-based” approach represents a departure from the previous approach to empowerment embodied in the Preferential Procurement Act. The previous approach focused largely on ownership of an entity and not on “empowerment” of the entity as a whole. This led to many entities engaging in “fronting” and other sorts of “window dressing”.

The elements of B-BBEE

According to section 9 of the BEE Act, the Minister of Trade and Industry may issue codes of good practice on BEE. These codes may include, among other things, indicators to measure BEE and the weighting to be attached to those indicators. The status of published codes is spelled out in section 10 which states that every organ of state and public entity must take into account and, as far as is reasonably possible, apply any relevant code of good practice issued in terms of the Act in:

- Determining qualification criteria for the issuance of licences, concessions or other authorisations in terms of any law;
- Developing and implementing a preferential procurement policy; and
- Determining qualification criteria for the sale of state-owned enterprises; and
- Developing criteria for entering into partnerships with the private sector.

A set of “Codes of Good Practice” was gazetted in February 2007 in terms of the BEE Act. These Codes form the basis for measuring BEE. A “Scorecard” approach is used in assessing BEE, giving points to the different aspects of BEE.

“Ownership” of an enterprise by black people is only one element which is assessed when evaluating the BEE status of an enterprise. It is accorded 20 percent of the points on the BEE Scorecard contained in the Codes. The other elements are: management and control (10 percent); employment equity (15 percent); skills development (15 percent); preferential procurement (20 percent); enterprise development (15 percent); and corporate social investment (5 percent). Various Codes of Good Practice have been published by the DTI in terms of the BEE Act which deal with all of these different aspects of the Scorecard.

Measurement of BEE

The Scorecard is used to arrive at the BEE score of a company, which is viewed as the “BEE Contribution Level” of that company and is mainly used in the context of tender evaluation and preferential procurement measurement. These contribution levels are set out in the table above. It is of course always possible that any private or corporatised public entity could have its own BEE requirements which it imposes in a tender context. These requirements could go beyond that which is required in Code 100, which deals with the measurement of the ownership element of BEE. In such a situation BEE measurement is a competitive assessment of what the BEE status of your competitors is relative to your own position.

General principles guiding the measurement of BEE

Code 000 sets out the framework for measuring BEE compliance. It establishes certain general principles, emphasising that it is the spirit of BEE rather than the wording of the Codes that should be the ultimate determiner of BEE. Other general principles established by Code 000 are as follows:

- The fundamental principle for measuring B-BBEE compliance is that substance takes precedence over legal form;
- In interpreting the provisions of the Codes any reasonable interpretation consistent with the objectives of the BEE Act and the B-BBEE Strategy must take precedence;
- The basis for measuring B-BBEE initiatives under the Codes is the B-BBEE compliance of the measured entities at the time of measurement;
- Any misrepresentation or attempt to misrepresent any enterprise’s true B-BBEE Status may lead to the disqualification of the entire scorecard of that enterprise;
- Initiatives which split separate or divide enterprises as a means of ensuring eligibility as an Exempted Micro-Enterprise, a Qualifying Small Enterprises or a Start-Up Enterprise are a circumvention of the BEE Act and may lead to the disqualification of the entire scorecard of those enterprises concerned;
- Any representation made by an entity about its B-BBEE compliance must be supported by suitable evidence or documentation. An entity that does not provide evidence or documentation supporting any initiative, must not receive any recognition for that initiative; and
- Wherever a Standard Valuation Method applies to measuring an indicator, the same standard should apply, as far as reasonably possible, consistently in all other applicable calculations.

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<th>STATUS RECOGNITION LEVEL</th>
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<tr>
<td>Level - One Contributor</td>
<td>100 points on the Scorecard</td>
<td>15%</td>
</tr>
<tr>
<td>Level - Two Contributor</td>
<td>85-100 points</td>
<td>125%</td>
</tr>
<tr>
<td>Level - Three Contributor</td>
<td>75-85 points</td>
<td>110%</td>
</tr>
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<td>Level - Four Contributor</td>
<td>65-75 points</td>
<td>100%</td>
</tr>
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<td>Level - Five Contributor</td>
<td>55-65 points</td>
<td>80%</td>
</tr>
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<td>Level - Six Contributor</td>
<td>45-55 points</td>
<td>60%</td>
</tr>
<tr>
<td>Level - Seven Contributor</td>
<td>40-45 points</td>
<td>50%</td>
</tr>
<tr>
<td>Level - Eight Contributor</td>
<td>30-40 points</td>
<td>10%</td>
</tr>
<tr>
<td>Non-Compliant Contributor</td>
<td>less than 30 points</td>
<td>0%</td>
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**Application of Codes or Sector Scorecards**

The BEE Act allows a charter and scorecard to be developed for each industry sector, by the businesses and interest groups within that particular sector, in partnership with government. This is to ensure that there is “buy-in” as to what is attainable from a BEE perspective within the sector and that the particular needs of each individual sector are considered when the sector-specific targets are set. The BEE Act provides that if government is happy with the sector-specific scorecard, it can be published as a Sector Code and it then becomes the benchmark against which BEE in that sector is evaluated for all government purposes.

There is, however, a big difference between a “Transformation Charter” which is published in terms of section 12 of the BEE Act and a “Sector Code” which is published in terms of section 9 of the BEE Act.

Statement 003 of Code 000 explains that the gazetting of a Transformation Charter under section 12 of the BEE Act is evidence of the commitment to promote B-BBEE in the applicable sector and is not binding on organs of state or public entities. Code series 000 to 700, which deal with the measurement of the various elements of BEE, and any statements under those Codes remain applicable to enterprises in the sector, despite the gazetting of their Transformation Charter under section 12 of the Act. By contrast, a Sector Code published in terms of section 9 enjoys equal status with that of any other Code.

As at January 2008, only a Financial Sector Charter, a Construction Sector Charter and a Property Sector Charter had been published in terms of section 12 of the BEE Act. As Transformation Charters, these are mere statements of intention and will not form the basis for evaluation of these companies by state entities, for example in the tender context.

Code 000 provides that the Generic Codes apply to any enterprise but a Sector Code that has been published in terms of section 9 the Act may also apply to the evaluation of BEE in an enterprise within that particular sector.

Different criteria apply to an Exempted Micro-Enterprise, a Start-up Enterprise and a Qualifying Small Enterprise.

Any enterprise with an annual Total Revenue of R5 million or less qualifies as an Exempted Micro-Enterprise. Exempted Micro-Enterprises are deemed to have B-BBEE Status of “Level - Four Contributor” having a B-BBEE procurement recognition of 100%. An Exempted Micro-Enterprise qualifies for a promotion to a B-BBEE Status of “Level - Three Contributor” having a B-BBEE procurement recognition of 110% if it is more than 50% owned by black people or by black women. Exempted Micro-Enterprises are allowed to be measured in terms of the QSE scorecard should they wish to maximise their points and move to the next procurement recognition level.

Any enterprise with an annual Total Revenue of between R5 million and R35 million qualifies as a Qualifying Small Enterprise. A Qualifying Small Enterprise must select any four of the seven Elements of B-BBEE for the purposes of measurement under the Qualifying Small Enterprise Scorecard contained in Code 800. Where a Qualifying Small Enterprise does not make a selection, its four best element scores will be used for the purposes of measurement. Start-up Enterprises must be measured as Exempted Micro-Enterprises for the first year following their formation or in-corporation. This provision applies regardless of the expected total revenue of the Start-up Enterprise. If however they tender on large projects they must submit a scorecard. The value of the tender will determine whether they are required to submit a QSE Scorecard or a Generic Scorecard.

**Monitoring of BEE compliance**

Before the BEE Act commenced, measuring BEE was difficult as there were no real benchmarks set and manipulation of the system through “fronting” was common. By bringing the application of BEE under one framework, the BEE Act will hopefully bring a greater degree of certainty to the measurement of BEE. The BEE Act does not itself provide for any monitoring or evaluation mechanism. The evaluation of BEE has also been inconsistent in the past. Recognising this, most industry charters provide for a “Charter Council” which is responsible for measuring compliance with the targets set and determining whether a particular practice meets the charter requirements or not.

The Codes provide that additional guidelines on accreditation of verification agencies will to be published in the future and as such accreditation agencies are still not able to get official sanction for the ratings which they provide. Various ratings agencies have nevertheless been established within the market.
If an organisation or industrial sector wishes to develop a transformation charter which will be acceptable to all stakeholders, then it needs to give careful consideration to the process it follows in formulating such a charter.

Below is a guide for the formulation of a transformation charter in an organisation and in an industrial sector.

**Formulating a transformation charter in an organisation:**

The process set out below is largely drawn from the one used in the formulation of the Bowman Gilfillan Transformation Charter.

**Outcomes**

The formulation process needs to deliver a transformation charter that is legitimate and credible to all interested parties. It must, as far as possible, address people’s hopes, fears and expectations or run the risk of being sabotaged. The charter must be comprehensive and include employment equity but also extend, for example, to ownership, culture, procurement and marketing.

The charter must be practical and cost effective. It must not be purely aspirational but must be realistic and capable of measurable implementation. It must also deliver the outcomes it defines within appropriate time periods. In order to be sustainable, the charter must be properly funded over a protracted period.

**Content**

The typical content of a comprehensive charter includes:

- A statement of the vision and mission;
- An articulation of the core values;
- The reason for change;
- The transformation goals and objectives;
- Near-term action plans;
- Mid-term action plans;
- Long-term action plans;
- A transformation charter management system; and
- A transformation charter monitoring and review plan.

**The process**

In order for the charter to have legitimacy it needs to be developed participatively by all relevant stakeholders rather than be designed by consultants and imposed from above. A tried and tested participative process used to formulate such a charter has the following stages:

**Stage 1: Preparation**

- **Acceptance of the process:** The formulation process needs to be presented to and adopted by the highest decision making body in the organisation.
- **Notification:** All employees or stakeholders need to be notified of the essence of the formulation process.
- **Convening of a focus group:** If the organisation is a large one, a representative transformation focus group needs to be convened. It needs to be a reasonably sized group of approximately 30 persons, depending on the size of the organisation. The focus group must be representative of all stakeholders, races, genders, levels and regions in the organisation.
• Employee and Stakeholder survey: a structured survey should be conducted among all persons or a wide range of persons in the organisation to gather their needs, concerns and ideas about transformation.

• Cultural audit (if appropriate) a structured cultural audit of the organisation should be conducted to measure the cultural strength of the organisation.

• Client satisfaction survey (if appropriate): a client satisfaction survey with a transformation component should be carried out to assess the level of client satisfaction with the organisation.

• Process facilitator: one or more facilitators should be appointed to facilitate the process. The role of the facilitators will be to direct the process and will not be to act as consultants or contributors to the substantive content of the charter.

• Administrative assistance: an administrative assistant should be appointed to assist the facilitators in administering the process. Among other things, the administrative assistant should be responsible, in consultation with the facilitators, for arranging dates, times, speakers and attendance during the process. The administrative assistant should also provide secretarial assistance and coordinate the employee and client surveys as well as the cultural audit.

stage 2: environmental scan

It is essential to conscientise people in the organisation, and members of the focus group in particular, about the environment in which the transformation charter is to be formulated. They need to understand the environmental forces which impact on the organisation and be exposed to as wide a variety of transformation opinions and options as possible. A variety of internal and external experts, stakeholders, clients and friends of the organisation should therefore be invited to make a series of presentations on, among other issues:

• What transformation means;
• What the persons in the organisation expect of the organisation in the area of transformation;
• The political, economic, technological and social context of transformation;
• Relevant legislative developments affecting transformation;
• Relevant transformation charters, plans and strategies;
• What competitors are doing about transformation;
• What clients expect of the organisation in the area of transformation;
• What friends of the organisation expect of it in the area of transformation; and
• The organisation’s present client, employee, competitor and supplier profiles.

Employees of the organisation who are not members of the focus group should also be invited to make oral or written representation to the focus group.

Stage 3: facilitated workshop

The facilitated workshop should thereafter deal with the following issues:

• Answering important questions: the focus group should articulate answers to the important question “Why change?”

• Vision and mission: it is essential to develop any transformation charter within the context of the organisation’s overall vision and mission. The focus group should therefore develop the charter in this context. If necessary, the focus group should propose any changes to the organisation’s vision and mission that it thinks are appropriate.

• Core values: the charter must also be designed with regard to the core values. Therefore, the focus group should focus on the core values during the workshop and propose any changes to these values that it thinks are needed.

• Transformation goals and objectives: the focus group should then develop broad long-term goals and objectives in relation to such matters as:
  • The service, products and clientele;
  • The qualifications, demographics, recruitment, selection, retention, evaluation and training of personnel at all levels in the organisation;
  • The culture and profile;
  • The competitors (if applicable);
  • The suppliers (if applicable); and
  • The organisation’s social responsibility.

• Transformation action plans: the focus group should then develop action plans with three time frames:
  • A near-term action plan;
  • A mid-term action plan; and
  • A long-term action plan.

These plans need to be very detailed and task-oriented. They also need clear timelines and the allocation of responsibility to designated persons.

• Transformation charter management system: the focus group should recommend in detail how the implementation of the action plans should be managed by the organisation.

• Transformation charter monitoring and review plan: the focus group should then recommend how the transformation charter should be monitored and reviewed.

Stage 4: adoption

The recommendations of the focus group should then be presented to the organisation’s highest decision making body for consideration and adoption.
Formulating a transformation charter in an industrial sector

In order to formulate a charter at Industry or Sector level the process must comply with the BEE Act and Statement 001 of Code 000. As stated above, section 12 of the BEE Act provides that the Minister must promote a transformation charter for a particular sector of the economy if the Minister is satisfied that the charter has been developed by major stakeholders in the sector and if the charter advances the objectives of the Act. Accordingly, a sector can apply to the Minister to have its transformation charter gazetted by providing evidence that it has complied with section 12 of the Act. These are however only published for information purposes and are not binding on state entities and departments in measuring BEE. Only if the scorecard that is developed is published by the Minister in terms of section 9 of the BEE Act as a Sector Code does it attain equal status with the Codes.

The Code recommends that when a sector is seeking to gazette its charter, there should be common commercial and other characteristics within the entities that form part of the proposed sector and that the sector should have national strategic importance. Furthermore, there should be a large volume of valuable transactions between the sector and organs of state or public entities collectively.

The Code recommends that when developing a transformation charter:

- The object of developing the charter must be publicly proclaimed;
- The initiators of the charter should set the charter’s mandate and overall objectives;
- The proposed mandate should be presented to the stakeholders for consideration and comment and the final mandate should reflect the concerns and needs of the stakeholders;
- The initiators of the charter should appoint a steering committee that represents the groups of stakeholders through influential and senior representatives from these groups;
- The steering committee should have equitable representation to enable participation by all the different stakeholders;
- The steering committee should appoint several working groups to aid in drafting the charter;
- Based on the recommendations of the working groups the steering committee should compile the first draft of the charter and present it to the stakeholders; and
- Importantly, innovative mechanisms should be implemented to ensure that under resourced parties contribute to the key strategic decisions (for example, setting up working groups, participating in discussions, outlining key principles, setting targets etc).

A charter council should be set up and should consist of an equitable composition of stakeholders. The charter council should, amongst others:

- Provide guidance on sector-specific matters that effect B-BBEE;
- Compile reports on the status of B-BBEE in the sector;
- Share information with sector members, approved accreditation agencies and the Minister; and
- Report to the Minister on the progress made by the sector subject to the transformation charter.

The consultation process for developing a charter can take any of the following forms:

- A major gathering of the stakeholders;
- Workshops addressing specific issues;
- Sector-wide road shows; or
- Other interactive mechanisms which ensure the effective communication and participation of the stakeholders.

The relevant industry stakeholders may include:

- Key enterprises;
- Industry bodies and the relevant chamber of commerce;
- Relevant government departments;
- Labour bodies or relevant trade unions;
- Industry regulators and civil society organisations; and
- Any others with a relevant interest in the sector.
In the first wave of BEE deals, as well as in the first wave of BEE state procurement criteria, most of the focus on the BEE status of an entity was directed to the “ownership” structure of the entity. This led to unscrupulous practices, particularly in relation to tenders where companies would “transform” their equity structure to reflect majority black ownership, while at the same time entering into shareholders’ agreements and management agreements which effectively “robbed” those black shareholders of the benefits of ownership.

As such, when measuring the rights of ownership of any category of black people in a Measured Enterprise, only rights held by natural persons are relevant. If the rights of ownership of black people pass through a juristic person, then the rights of ownership of black people in that juristic person are measurable. This principle applies across every tier of ownership in a multi-tiered chain of ownership until that chain ends with a black person holding rights of ownership.

The modified Flow-through principle allows one entity in a chain of ownership that is more than 50 percent black owned to be treated as 100 percent black owned. This means that when calculating Exercisable Voting Rights and Economic Interest held by black people in general (not black women, broad-based ownership or designated group) the following applies: Where in the chain of ownership, black people have a flow-through level of participation in excess of 50 percent, then only once in that chain may such black participation be treated as if it were 100 percent black.

Measurement and targets for ownership

As discussed above, BEE compliance is about the extent to which the entity meets employment equity targets, procures goods and services from black-owned suppliers, enters into joint ventures with black businesses and assists in the creation of black businesses, as well as transfers a percentage of the enterprise into the ownership and control of black people.

An overall target of 25 percent plus one vote by black people is set for ownership. If a company achieves this as well as the targets set for black women and broad-based ownership, full ownership points can be scored.
Nevertheless, the BEE ownership target and score has to be understood with reference to what the BEE status of one’s competitors is. If there are a number of companies with high black ownership and a good BEE ranking, then if your entity does not set itself a similar target you may lose market share or lose out in competing for state authorisations or permits.

“Ownership” is given 20 points out of 100 in Code 100. The availability of “bonus points” means that one could in theory score more than 20 points out of 20. Targets are set by the Dti in Code 100 for the level of ownership required. These points and targets are as follows:

<table>
<thead>
<tr>
<th>MEASUREMENT CATEGORY &amp; CRITERIA</th>
<th>WEIGHTING POINTS</th>
<th>COMPLIANCE TARGET</th>
<th>APPLICABLE PRINCIPLE</th>
</tr>
</thead>
<tbody>
<tr>
<td>Exercisable Voting Rights in the hands of black people</td>
<td>3</td>
<td>25% plus one vote</td>
<td>Flow-Through and Modified Flow-Through Principles</td>
</tr>
<tr>
<td>Exercisable voting rights in the hands of black women</td>
<td>2</td>
<td>10%</td>
<td>Flow-Through Principle</td>
</tr>
<tr>
<td>Economic Interest to which black people are entitled</td>
<td>4</td>
<td>25%</td>
<td>Flow-Through and Modified Flow-Through Principles</td>
</tr>
<tr>
<td>Economic Interest to which black women are entitled</td>
<td>2</td>
<td>10%</td>
<td>Flow-Through Principle 1</td>
</tr>
<tr>
<td>Economic Interest to which black designated groups are entitled</td>
<td>1</td>
<td>2.5%</td>
<td></td>
</tr>
<tr>
<td>Ownership Fulfilment: black owners unconditionally entitled to receive dividends</td>
<td>1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Net Value</td>
<td>7</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Bonus points: ownership of enterprise by black new entrants</td>
<td>2</td>
<td>10%</td>
<td></td>
</tr>
<tr>
<td>Bonus points: involvement in ownership of black participants in employee ownership schemes, broad-based schemes and co-operatives</td>
<td>1</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

### The exclusion of specified entities when measuring black ownership

The Codes provide that when determining ownership in a measured entity, ownership held directly by organs of state or public entities must be excluded.

Similarly, when determining ownership in a measured entity, rights of ownership held by Mandated Investments may be excluded. The maximum percentage of the ownership of any measured entity that may be so excluded is 40 percent.

A measured entity electing not to exclude Mandated Investments when it is entitled to do so, may either treat all of that ownership as non-black or obtain a competent person’s report estimating the extent of black rights of ownership originating from that Mandated Investment. The measured entity may not, however, selectively include or exclude Mandated Investments. An election to exclude one Mandated Investment is an election to exclude all, and vice versa.

In this instance black participation arising from continued recognition of black ownership cannot contribute more than 40 percent of the score on the ownership scorecard.

Secondly, in the case of a loss of shares by the black investor, the following additional rules apply:

- A written tripartite agreement between the Measured Enterprise, the black Participant and a lender must record the loan or security arrangement, unless the measured entity is the lender, and
- The period over which the points were allocated or recognised will not exceed the period over which the shares were held.

### The recognition of ownership after the sale or loss of shares by black participants

The Codes identify two instances in which former black ownership can be recognised.

In the first instance, a measured entity is allowed to recognise a portion of black ownership after a black participant has exited through the sale or loss of shares subject to the following criteria:

- The black participant must have held shares for a period of three years;
- Value must have been created in the hands of black people; and
- Transformation within the measured enterprise must have taken place.

In this instance black participation arising from continued recognition of black ownership cannot contribute more than 40 percent of the score on the ownership scorecard.

Secondly, in the case of a loss of shares by the black investor, the following additional rules apply:

- A written tripartite agreement between the Measured Enterprise, the black Participant and a lender must record the loan or security arrangement, unless the measured entity is the lender, and
- The period over which the points were allocated or recognised will not exceed the period over which the shares were held.

### Measurement and targets for control

Code 200 which has also been published as a binding code in terms of the BEE Act deals with the points that are awarded for representation of black people on the Board of Directors of the Measured Enterprise and in top management. “Control” accounts for 10 points out of 100 on the Generic Scorecard. What is measured is the percentage of black persons in executive management and/or board and board committees. The points and targets are as set out in the table below.

<table>
<thead>
<tr>
<th>MEASUREMENT CATEGORY &amp; CRITERIA</th>
<th>WEIGHTING POINTS</th>
<th>COMPLIANCE TARGET</th>
</tr>
</thead>
<tbody>
<tr>
<td>Board participation:</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Exercisable voting rights of black board members using the Adjusted Recognition for Gender</td>
<td>3</td>
<td>50%</td>
</tr>
<tr>
<td>Black Executive Directors using the Adjusted Recognition for Gender</td>
<td>2</td>
<td>50%</td>
</tr>
<tr>
<td>Top management:</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Black senior top management using the Adjusted Recognition for Gender</td>
<td>3</td>
<td>40%</td>
</tr>
<tr>
<td>Black other top management using the Adjusted Recognition for Gender</td>
<td>2</td>
<td>40%</td>
</tr>
<tr>
<td>Bonus points:</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Bonus points: ownership of enterprise by black new entrants</td>
<td>1</td>
<td>40%</td>
</tr>
</tbody>
</table>
The evolution of BEE equity participation

Ashleigh Hale

While the aspect of ownership and control is only one of the components of B-BBEE, it is the most visible aspect and as a result receives a lot of attention. It is, however, not always the easiest element to address to ensure long-term sustainability. The low level of access to finance and capital resources by black investors has been and still is the main challenge relating to the transfer of ownership and control to black investors. This lack of access to funds has been instrumental in shaping the manner in which BEE transactions are structured.

The early structures

The typical structure that was used to transfer equity to BEE investors during the first wave of BEE transactions in the late 1990s was the SpV. The structure would generally be established as follows:

- A company (i.e. the SpV) would be registered and the BEE investor would be issued with 100 percent of its ordinary shares at nominal value;
- The SpV would then be capitalised by a financial institution through the issue of preference shares to the financier (generally redeemable at the end of three to five years);
- The capital would then be used by the SpV to acquire shares in the operating company seeking to transfer equity to the BEE investor; and
- Dividend income received from the equity investment in the operating company would be used by the SpV to pay the preference dividends and to redeem the preference shares at the end of their term.

Few of the BEE transactions which made use of the SpV have been successful and sustainable. This has been due partly to market conditions and partly to the nature of the SpV structure. Volatile markets, the 1998 market crash and the high interest rate environment in South Africa during the late 1990s meant that dividend receipts on the equity investment were not sufficient to service the funding obligations in accordance with the terms of the preference shares. As a result, many of the underlying equity investments reverted to the financial institutions when repayment obligations could not be met.

In general, there was also a lack of real commitment to BEE and often the BEE investor was a passive, indirect shareholder having no influence on the day-to-day operations of the company. In many cases, the financial institution controlled the underlying equity investment through the onerous terms of the preference shares. This was compounded by a general failure to address the other aspects of empowerment, such as skills development, procurement and management participation.

The new structures

The structures that are currently being used to transfer equity to BEE investors are generally more sophisticated than the first generation models. In addition, the transfer of equity tends to be vendor financed, rather than being financed by institutional funding. This obviously reduces transaction and funding costs. The new structures also differ from the older structures in that:

- Equity transfers are linked to other components of empowerment, such as skills development, management participation and board representation, and
- There is often a transfer of equity to a broad-based pool of black investors, such as transfers to employee share trusts, community trusts and non-profit organisations.

Many of the new structures facilitate the transfer of equity to BEE investors through the creation of hybrid classes of shares, incorporating elements of debt and equity. An example of such shares would be those known as “deferred dividend shares”. This class of shares typically gives the BEE investor the same voting rights as an ordinary shareholder on the date of issue (thereby meeting the control requirements of the BEE scorecards), but the right to receive dividends in respect of the shares is deferred until the dividends that would have been received during the deferred period are equivalent to the amount that the BEE investor has been funded to acquire the shares in the first place.

Options are often used in BEE structures to enable BEE investors to acquire shares at a future date. One of the large banks in South Africa has transferred approximately 10 percent of its shares to black shareholders through the issue of redeemable preference shares at par value. The redeemable preference shares each have an option attached to them entitling the holder to subscribe for one ordinary share at a strike price linked to the market value of the ordinary shares on the date the option is exercised. The option will be exercisable during a fixed period, three years after the date of issue of the redeemable preference share. If and when the option is exercised, the redeemable preference share will be redeemed at its par value.

A variation of this structure has been adopted by one of the large listed South African retail companies. The redeemable preference shares have been issued to black employees through an employee share trust and until the date on which the shares are convertible to ordinary shares, the trust is entitled to receive bi-annual payments equivalent to a dividend, on behalf of the employee beneficiaries.

Sustainability of the new structures

The newer structures are preferable to the earlier structures in that:

- They accommodate broad-based BEE ownership;
- They often incentivise the BEE investor to make a meaningful contribution by linking the economic benefits that can be derived by the BEE investor from its investment, to the growth of the company;
- The transaction and funding costs are significantly lower; and
- In general, the structures can be easily unwound at a minimal cost, should the parties so require.

The new structures are, however, neither perfect nor without their challenges. The complexity of the new vendor-financed structures has meant that the parties involved are often at risk of contravening section 38 of the Companies Act, which prohibits a company from giving any type of financial assistance for the purpose of or in connection with the purchase of or subscription for its shares, or shares in its holding company. This problem has been alleviated to some extent due to the amendment to section 38 effective in December 2007 which allows for a company to give financial assistance, subject to the company being solvent and liquid following the giving of the financial assistance and subject to the passing of an appropriate special resolution by shareholders.

The parties are also at risk of incurring substantial upfront and future tax costs. These issues are dealt with in more detail in later chapters of this Guide.
Chapter Five

Financial assistance for empowerment

Ashleigh Hale

One of the main challenges relating to the transfer of ownership and control to black investors is the low level of access to capital resources by black investors.

In the first wave of empowerment deals after 1994, black investors generally relied heavily on external, highly geared funding, mainly from institutional investors. The repayment of borrowings depended on the need for inordinate growth in the equity value of the underlying investments. Many of these ventures failed, with the equity ending up in the hands of the financial institutions.

The current wave of BEE transactions have attempted to address the lack of access to finance and to reduce transaction and finance costs through vendor financing mechanisms. This usually involves employing elaborate transaction structures which generally involve a combination of debt, equity and hybrid instruments (such as deferred shares, options and preference shares). These are complex schemes involving various legs and multiple parties (subsidiaries, SPVs, schemes involving various legs and preference shares). These are complex deferred shares, options and hybrid instruments (such as a combination of debt, equity structures which generally involve employing elaborate transaction mechanisms. This usually involves costs through vendor financing to reduce transaction and finance lack of access to finance and to have attempted to address the current wave of BEE transactions ending up in the hands of the equity investors.

The need for inordinate growth in the value of the underlying investments is low capital resources by black investors.

The main purpose behind section 38 of the Companies Act is to protect shareholders and creditors and to prevent abuses where persons with insufficient funds seek to acquire control of a company by using the company’s funds and assets. A classic example of financial assistance that would be subject to the provisions of this section would be where the company mortgaged its assets as security for a loan given by a third party to a party which then uses the proceeds to buy shares in the company. Another example is where company A subscribes for preference shares in company B, which then uses the proceeds to acquire ordinary shares in company A. There are, of course, other transactions where the financial assistance is more indirect and part of a broader scheme (for example where subsidiaries or third parties are interposed between the company and the purchaser), but which might nevertheless be in contravention of the section. This is where many current BEE transaction structures need to be carefully considered.

Section 38 of the Companies Act

The advisors to BEE transactions have to be continually alert to possible contraventions of section 38 of the Companies Act, which prohibits a company from giving any type of financial assistance, directly or indirectly, in connection with the purchase of or subscription for its shares or shares in its holding company, unless the assistance is specifically authorised by a special resolution of shareholders and the board is satisfied that the company will be liquid and solvent following the giving of the financial assistance.

The consequences of contravening the section are severe – the transaction will be void and the contravention cannot be cured by any shareholder, creditor or court approval. In addition, the giving of the financial assistance and each of its directors will be guilty of a criminal offence.

The main purpose behind section 38 is to protect shareholders and creditors and to prevent abuses where persons with insufficient funds seek to acquire control of a company by using the company’s funds and assets. A classic example of financial assistance that would be subject to the provisions of this section would be where the company mortgaged its assets as security for a loan given by a third party to a party which then uses the funds to buy shares in the company.

Another example is where company A subscribes for preference shares in company B, which then uses the proceeds to acquire ordinary shares in company A. There are, of course, other transactions where the financial assistance is more indirect and part of a broader scheme (for example where subsidiaries or third parties are interposed between the company and the purchaser), but which might nevertheless be in contravention of the section. This is where many current BEE transaction structures need to be carefully considered.

Amendments to section 38

In order to facilitate the funding of the transfer of ownership and control in the economy to BEE investors and to ensure that the recently enacted broad-based empowerment legislation can properly be implemented, section 38 has been amended. The amendment was adopted in the second half of 2006, and took effect on 14 December 2007.

Companies are now permitted to give financial assistance for the purchase of or subscription for its shares or shares in its holding company, provided that the company’s board is satisfied that following the giving of the financial assistance, the company will remain solvent and it will have sufficient liquidity to pay its debts as and when they fall due in the ordinary course of business. The board must also give consideration in this regard to any contingent liabilities which may arise to the company. The giving of financial assistance must be approved by a special resolution of the shareholders (i.e. a 75 percent approval level).

It is intended that the whole of the Companies Act (including section 38) will be replaced towards the end of 2008 with a new Act which will take effect during 2010. The Companies Bill was published for comment in early 2007. The provisions of section 40 of the Bill relating to the giving of financial assistance for the purchase of shares are similar to those contained in the amended section 38, but go slightly further. The Bill provides that the giving of financial assistance will be permitted if the board is satisfied that following the giving of the assistance, the company passes the solvency and liquidity tests (along the lines described above) and authority is given pursuant to a special resolution of shareholders or an authority set out in the company’s memorandum of incorporation. The board must also be satisfied that the terms under which the assistance is proposed to be given are fair and reasonable to the company.

In many instances, the giving of financial assistance by a company to enable a BEE investor to acquire shares in it can only be in the interests of the company and its shareholders, and therefore, the proposed changes to the financial assistance prohibitions are to be welcomed.
Many multinational companies have argued strongly that they should not be subject to the transfer of ownership requirements contained in the Codes and in certain transformation charters (i.e. the Financial Sector Charter and the draft Information Communications Technology Charter). The arguments have been based on the fact that a multinational would suffer inherent commercial harm to its business due to, amongst others, legal, technological or group policy barriers, which are incompatible with the sale of equity.

As an alternative, multinationals lobbied strongly in favour of the introduction of “equity equivalents”, which would allow them to score extra points in the other elements of the Scorecard, such as enterprise development, skills development, employment equity and procurement, to make up for the points that they would not be able to score in the ownership element of the Scorecard.

The DTI revised the Codes in early 2007 to take these arguments into account and to continue to attract foreign direct investment into South Africa. While the general principle is that multinational companies doing business in South Africa either through a branch office or a subsidiary are required to comply with BEE regulatory requirements, the Codes now give greater flexibility to multinationals regarding BEE compliance through the recognition of equity divestitures in non-South African Enterprises and equity equivalents.
In calculating the ownership score, Multinational businesses are required to exclude any portion of the business value of their South African operations gained from non-South African sources. A Standard Valuation Method must be used to determine the value of the South African operations.

Multinational businesses may recognise sales of equity instruments in non-South African enterprises to black people, on satisfaction of the following requirements:

- The non-South African enterprise must form part of the chain of ownership between the Multinational business and its eventual holding company; and
- The transaction must comply with South African exchange control requirements; and
- The percentage of the value of the equity instruments sold to the value of the multinational business must represent the recognisable black claim to Economic Interest;

**Equity divestitures in non-South African enterprises**

**Equity Equivalent Programmes**

An “Equity Equivalent Programme” is a public programme or scheme of any government department in South Africa or any other programme approved by the Minister as an Equity Equivalent Programme in accordance with the following:

- The Minister may approve an Equity Equivalent Programme after the Multinational has consulted with the Sectoral Line Ministry, Premiers or other stakeholders in any government department, provincial government or local government with respect to their equity equivalent proposal;
- Any Equity Equivalent Programme forming part of a Sector Code constitutes an approved programme; and
- Such programmes are preferably sector specific, however, the Minister may consider requests for approval of programmes that are not.

Equity Equivalent Programmes may involve programmes that:

- Support the Accelerated and Shared Growth Initiative for South Africa, the Joint Initiative for Priority Skills and the National Skills Development Strategy;
- Promote enterprise creation in respect of cooperatives that are more than 50 percent owned by black people, more than 50 percent owned by black women or more than 50 percent owned by members of black designated groups; or
- The percentage of exercisable voting rights of which black participants are entitled must be at a level equivalent to the value of equity interest sold to the local multinational enterprise of which the aforementioned black participants hold;
- Ownership fulfilment arising from offshore equity interests must be measured in a manner consistent with principles set out in the framework for measuring the ownership of Broad Based Black Economic Empowerment.
- Promote socio-economic advancement or contribute to the overall social development of South Africa.

Examples of Equity Equivalent Programmes include enterprise creation or investment in social advancement.

Equity Equivalent Programmes may have as their beneficiaries enterprises in which black people hold more than 50 percent of the Exercisable Voting Rights and more than 50 percent of the Economic Interest;

- Any Equity Equivalent Programme forming part of a Sector Code constitutes an approved programme; and
- Such programmes are preferably sector specific, however, the Minister may consider requests for approval of programmes that are not.

Equity Equivalent Programmes may also benefit communities, natural persons or groups of natural persons where at least 75 percent of the beneficiaries are black people and the same percentage of economic value is derived by black people.

**Monetary equity equivalent contributions**

Only a Multinational which is subject to a Global Practice restricting the sale of equity in or the sale of businesses in its regional operations may claim Equity Equivalents from an Equity Equivalent Programme. It must be noted that this restriction does not apply to a Multinational’s entitlement to divestiture discussed above. The Global Practice must be a globally and uniformly applied practice and must have existed before the promulgation of the BEE Act (i.e. before 21 April 2004).

A Multinational participating in an Equity Equivalent Programme cannot receive any points for ownership under any statement in the Code for measuring ownership other than Statement 10). Note this restriction also does not apply to a Multinational’s entitlement to claim ownership points for a divestiture discussed above.

Any Contribution towards the ownership element of BEE made by Multinational Businesses or South African Multinationals is measurable against the value of their operations in South Africa.

The target, which entitles the Multinational to full points, is 25 percent of the value of the South African operations of the Multinational, determined using a Standard Valuation, or four percent of total revenue from its South African operations annually over the period of continued measurement.

The ownership score of a Multinational participating in an Equity Equivalent Programme is calculated in terms of one of two formulae, depending on whether the Equity Equivalent Contribution is made upfront or on an annual basis.

**The Financial Sector Charter**

The Financial Sector Charter is currently the only sector charter which contains specific qualifications for the adherence by foreign financial institutions to the BEE ownership and control targets set out in the Charter. The intention is that the Financial Sector Charter would take precedence over the Codes in relation to financial sector specific matters.

The Financial Sector Charter provides that if a foreign financial institution has in place a global policy which precludes it from accommodating local ownership participation, it will be exempt from the ownership provisions set out in the Charter. In addition, if a global policy to which a financial institution is subject imposes any board members, executive or senior managers on the local operation, those personnel will not be taken into account for purposes of calculating the board, management and human resource development targets set out in the charter. If foreign financial institutions fall within these qualifications, they will not be required to complete the relevant sections in the scorecard.

**Conclusion**

Despite the exemptions and qualifications described above, many prominent multinationals have sold equity stakes to local empowerment partners. These include Merrill Lynch, BP, Shell, Marsh, Deutsche Bank, IDB, Unions and Alcatel.
Chapter Seven

The measurement of trusts in terms of the codes

Ashleigh Hale

Code 100, which sets out the measurement principles relating to ownership, recognises that black persons may hold their ownership rights through trusts. The Codes have distinguished between broad-based ownership schemes, employee share ownership schemes and all other trusts (for example, family or business trusts).

The measurement of trusts

Code 100 sets out certain minimum qualifying criteria for each type of trust. If these criteria are met, the trust concerned may contribute a maximum of 40 percent of the total points on the ownership scorecard of the measured entity concerned.

If certain additional criteria are met for each type of trust, the trust may then contribute towards 100 percent of the total points on the measured entity’s ownership scorecard.

The key measurement principles pertaining to the measurement of black ownership must also be applied, notwithstanding the application of the qualifying criteria for trusts summarised below. This means, for example, that the Flow-Through Principle must also be applied to properly measure the Voting Rights and Economic Interest ultimately held by black persons through a trust in the measured entity.

Broad-based ownership schemes

If a scheme complies with the minimum qualifying criteria set out below, it will be a broad-based ownership scheme and the enterprise will be entitled to claim up to 40 percent of the total ownership points through the scheme. The rules with which it is required to comply are as follows:

• The return on assets owned by the scheme in any one year, less amounts distributed to or reserved for future distribution to beneficiaries, does not exceed 15 percent;
• The constitution of the scheme must record the rules governing any income/capital received in respect of scheme assets reserved for future distribution;
• At least 85 percent of the value of benefits allocated by the scheme must accrue to black people;
• At least 50 percent of the fiduciaries of the scheme must be independent persons having no employment with or direct or indirect beneficial interest in the scheme;
• The chairperson of the scheme must be independent, and;
• On the winding-up or termination of the scheme, all accumulated assets must be transferred to the beneficiaries or to an entity with similar objectives.

In order to obtain all of the points on the ownership scorecard for ownership through a broad-based ownership scheme, it must also be shown that the scheme has an operational track record or demonstrable evidence of full operational capacity to operate as a broad-based ownership scheme. Operational capacity must be evidenced by suitably qualified and experienced staff in sufficient number, experienced professional advisors, operating premises and all other necessary requirements for operating a business.

Employee share ownership schemes

An employee share ownership scheme must meet the following minimum qualifying criteria to contribute a maximum of 40 percent of the total points on the ownership scorecard of the measured entity concerned:

• The constitution must define the participants (through a defined class of beneficiaries or a list of names) and the proportion of their claim to receive distributions (through a written record of fixed percentages of the claim, or a formula for calculating the claim);
• The trustees of the scheme must have no discretion with regard to the identity of the participants or proportion of their claim;
• The participants must take part in appointing at least 50 percent of the trustees and managing the scheme at a level similar to the management role of shareholders in a company;
• The constitution of the scheme must be available on request to any participant in any official language of South Africa with which that participant is familiar;
• The financial statements of the scheme must be presented to participants at the annual general meeting of the scheme; and
• All accumulated assets of the scheme are payable to participants on the earlier of a specified date or event or on the termination or winding-up of the scheme.

In order to obtain all of the points on the ownership scorecard for ownership through an employee share ownership scheme, it must be shown that the scheme has an operational track record. This is demonstrated on the same basis as the operational track record of a broad-based ownership scheme.

Other trusts

The minimum qualifying criteria for the recognition of all other trusts, such as family and business trusts, are as follows:

• The trust deed must define the beneficiaries (through a defined class of beneficiaries or a list of names) and the proportion of their entitlement to receive distributions (through a written record of fixed percentages of entitlement or a formula for calculating the entitlement);
• The trustees must have no discretion on the above mentioned terms; and
• On the winding-up or termination of the trust, all accumulated assets of the trust must be transferred to the beneficiaries or to an entity representing the interests of the beneficiaries.

In order to obtain maximum points on the ownership scorecard for all other trusts, the company measuring its ownership score must obtain a certificate issued by a “competent person” providing that the trust was created for a legitimate commercial reason which must be fully disclosed and the terms of the trust do not seek to circumvent the provisions of the Codes and the BEE Act. A “competent person” is described as any person who has the necessary training, qualifications, skill or experience necessary for providing such certificate, for example a lawyer or a BEE rating agency.

In our view, these criteria applicable to “other trusts” do not also apply to trusts which are the vehicle for broad-based ownership schemes or employee share ownership schemes. Such schemes are judged solely on the specific criteria set out above.
The tax consequences of BEE transactions have been overlooked in the past and have caused grave hardship for both the participants – often resulting in double taxation of their economic profits – and the companies undertaking BEE transactions, who have often incurred significant tax burdens as a result of the arrangements to accommodate a BEE partner.

This lack of cohesion between tax and BEE legislation has led to several changes to tax legislation (although the changes are not described as being made for BEE purposes). However, several obstacles remain and careful structuring of BEE transactions is still required to avoid the pitfalls.

**Equity ownership requirement**

The equity ownership requirements for BEE structures in the Codes and the gazetted sector Transformation Charters require BEE shareholders to acquire shares of varying percentages. Generally, a 25.1 percent BEE shareholding is the equity target to acquire full ownership points on the Scorecard, and the original shareholders retain 74.9 percent of the equity. However, the tax relief for inter-group restructurings under the ITA was based on a holding in the group subsidiaries of 75 percent. To facilitate compliance with the BEE equity ownership requirements, the tax definition of “group of companies” has been changed. The percentage of shareholding at the level of Section 24N will form part of the same group of companies, has been reduced from 75 percent to 70 percent, which allows the BEE company to acquire an interest of 25.1 percent in a subsidiary without jeopardising the group tax relief.

The amended definition of “group of companies” in the ITA is important because BEE transactions typically involve a transfer of assets to a new group company which undertakes the joint venture with a BEE partner. Under the group restructure provisions of the ITA, tax is deferred where assets or shares are disposed of between the group companies. Furthermore, the payment of dividends by a subsidiary to its holding company qualifies for a SITC exemption in certain circumstances, provided they are part of the same group of companies.

Many BEE structures make use of trusts, particularly for the purposes of broad-based BEE involvement. Previously, holding shares through a BEE trust resulted in certain categories of group restructuring. However, the tax relief for such group restructuring would not be available.

For example, tax relief for company formation transactions previously expressly excluded trusts. Trusts may now participate in company formation transactions as defined in Section 42 of the ITA and will be entitled to the relevant tax relief.

**Sales linked to future profits**

BEE transactions have often been structured on the basis that the purchase price of the assets is unquantifiable or variable, in that it will be determined with reference to the future profits of the JV business. These types of arrangements created tax problems: sellers either understated their taxable income or gains (resulting in excessive early tax losses, followed by a later reversal of such losses as income) or overstated their taxable income or gains (resulting in excessive tax payable upfront, followed by losses later). Purchasers similarly had difficulty in determining the cost of the assets that they had bought. Section 24M of the ITA grants tax relief, by providing that where consideration for assets cannot be quantified, the purchase price will be deemed to have accrued in the year in which the consideration is determined, as opposed to the year in which the asset is disposed of. The purchaser is similarly deemed to have incurred expenditure only when the amounts become quantified.

Section 24N deals with the sale of equity shares, where the purchase price is not immediately due and payable. Section 24N allows for tax on the purchase price to be deferred to the date on which the purchase price is actually received, if the following five conditions are met:

- More than 25 percent of the sales proceeds must be due and payable after the first year, based on future profits;
- A “meaningful stake” in the company must be sold, which is 25 percent of the total value of the equity shares of the company in that year;
- The seller and the purchaser must not be connected persons to each other after the disposal; and
- The purchaser is obliged to return the shares to the seller if the amount is not paid when it becomes due; and
- The claim received by the seller is not payable on demand or readily tradable in the open market.

**Further proposed amendments**

The Minister of Finance announced in his Budget Speech in February 2007 that the Government recognised that it was difficult for BEE partners to raise finance for BEE transactions. Funding structures for such transactions used to be complex due to the historic prohibition on a company giving financial assistance to shareholders to acquire shares in the company. It was announced that the tax legislation would be amended in four areas of concern, so as to address these issues:

- **Share cross-issues:** Many BEE transactions involve the takeover cross-issue of shares. Typically a company issues ordinary shares to the BEE partners and in return the BEE partners finance the acquisition of such ordinary shares by issuing preference shares to that company. When the ordinary shares reach a pre-determined value, the BEE partners sell a portion of the ordinary shares for cash and use these funds to redeem the preference shares. The Minister proposed that the ITA be amended to ensure that the dual dispositions did not give rise to unwarranted capital gains while simultaneously ensuring that the proposed structure did not trigger artificial capital losses.
- **Share buybacks of listed shares:** BEE-related restructuring of listed shares frequently involve a two-step transaction. The shares are purchased from the public before they are transferred to BEE partners pursuant to a forced sale in terms of section 311 of the Companies Act.
Problems relating to funding costs

A further typical problem which arises in any acquisition of shares by a BEE partner is the non-deductibility of interest cost in respect of loans raised to finance the purchase. If the funding is raised by the BEE company through the issue of preference shares, the problem does not arise. However, it is often difficult to arrange such funding often in the market and the banks will usually require guarantees from the partner company. Furthermore, the dividends on the underlying shares usually do not suffice to service the coupon required on the preference shares. This means the BEE company is required to sell a portion of its shares to service the preference share funding. Under the current uncertainty about the capital or revenue nature of the proceeds from the sale of shares, it is very possible that such gains may be subject to normal corporate tax in the BEE company which makes it even more difficult to service the preference shares. The new dispen-
sation, announced in the Budget 2007, to determine the capital or revenue nature in the case of private equity should help to ease this burden (provided the shares were held for three years). However, this still implies an effective burden of 24% after SIC payable by the BEE company. The position can be vastly improved if the preference share company did not hold the shares directly, i.e. the shares could be held via a trust set up by the BEE participants. The preference share company would then raise the capital and contribute the capital to the trust to buy the shares. If the trust sold the shares, the gain could be distributed to the beneficiaries to achieve the effective tax rate of 10 percent. They could then fund the trust to service the preference share funding.

Problems relating to employee/director participants

The move to encourage broad-based participation in BEE arrangements, have resulted in many directors and employees of the BEE partner company being involved in the BEE share participation. The directors and employees would be granted shares in the new JV company. Typically, they would be required to work for the JV company for a certain period before they are entitled to dispose of the shares. This implies that the shares would fall within the scope of section 8C of the ITA, which aims to tax the benefits acquired under employee/management share schemes as remuneration. Section 8C applies to any equity instrument which was acquired by a person by virtue of employment or office as director. Therefore, if the terms of the share allocation are linked to the person’s employment or directorship, the section applies. This means that the eventual gains realised by the BEE participants would be taxable at the maximum marginal rates. Even if the shares were held for more than three years, they would not be entitled to treat the gains as capital in nature. Section 8C can have very harsh consequences, inter alia, the tax liability is triggered when the holder of the shares becomes entitled to sell the shares without restrictions. The tax is due even if the person does not sell the shares. In many cases, the employee would thus be forced to sell the shares in order to pay the 40 percent tax liability.

The above consequences of section 8C may not have been intended, but they are difficult to avoid. It is possible to structure a share scheme to ensure that the provisions do not apply, but this often requires a sacrifice of some of the commercial objectives, which is not ideal. Careful planning is required in this regard.

The Competition Act requires that the issue of BEE be considered in the competition approval process. The Preamble to the Competition Act recognises, inter alia, that apartheid and other discriminatory laws and practices have resulted in excessive concentrat-
tions of ownership and control within the national economy, inadequate restraints against anti-competitive trade practices and unjust restrictions on full and free participation in the economy by all South Africans. It is also recorded that the Competition Act was promulgated to regulate the transfer of economic ownership in keeping with the public interest.

The BEE imperative has been seen to apply, in particular, in the context of transactions that are notifiable mergers in terms of the Competition Act. The Competition Act requires the competition authorities to consider whether a merger can or cannot be justified on substantial public interest grounds. The competition authorities must consider, in conjunction with competition and other public interest issues, the effect that a merger will have on the ability of small businesses, or firms controlled or owned by historically disadvantaged persons, to become competitive.

This issue may be illustrated by the merger between Shell South Africa (Pty) Ltd and Tepco Petroleum (Pty) Ltd ("Tepco"). Tepco was a subsidiary of Thebe Investment Corporation (Pty) Ltd ("Thebe"), which is regarded as a "broad-based black empowerment company." The merger was unconditionally approved by the Competition Tribunal, despite the Competition Commission recommending that certain conditions be imposed. The Tribunal did not agree with the conditions because, among other things, they were viewed as an attempt to restructure the merger in a form that neither of the merging parties (including the BEE party) wanted. The conditions were also seen as non-viable: vague, invalid and unreasonably impeding the freedom of the parties to make whatever “bargain suits their respective commercial interests”.

The Tribunal noted that the rationale for the Competition Commission’s recommendation was that it did not wish to see the ownership and control of a firm passing out of the hands of HDPs. The Tribunal noted that the reluctance of the Competition Commission to recommend an outright prohibition of the merger on public interest grounds was justified because the transaction would not lead to the exit of a historically disadvantaged investor from the petroleum industry. The Tribunal asked the question: “Would the ‘competitiveness of firms owned by historically disadvantaged persons’ have been promoted if Tepco, constrained in its ability to dispose of a troublesome investment, had sustained significant damage?” The Tribunal also said that even if Tepco had been a company in perfect health, the Competition Commission should be extremely careful when, in the name of supporting historically disadvantaged investors, it intervenes in a commercial decision of an investor (like Thebe), such as for example where a company wishes to use funds gained in one area for growth in another (possibly more viable area of business). Limitations in this regard would possibly place an empowerment company at a commercial disadvantage (precisely that which the Competition Act may be aiming to prevent). Such a scenario may even condemn empowerment firms to the “margins of the economy and the margins of those sectors in which it believes it is best able to make a significant mark.” The Tribunal stated that “The Competition Commission’s role is to promote and protect competition and a specified public interest. It is not to second-guess the commercial decisions of precisely that element of the public that it is enjoined to defend [...]."
Human resources development, which encompasses employment equity and skills development, forms part of the core strategies for bringing about BEE in South Africa. These elements are, in fact, given significant weighting in determining the extent to which an enterprise contributes towards BEE. In terms of the Generic Scorecard, employment equity and skills development each account for 15 percent of the BEE weighting of an enterprise. Skills development is discussed in Chapter Eleven below.

As we discuss in Chapter One, it is envisaged that the government will apply the weightings contained in the various scorecards whenever it grants licenses or concessions, sells assets or State-owned enterprises, enters into PPPs or engages in economic activities. However, because the BEE status of private entities is not only determined in terms of ownership, but also with reference to human resource development and indirect empowerment, the reach of the scorecards and the BEE Act is wider than public-private relationships. It also impacts on relationships between private entities. The result is that BEE and achievement in terms of the scorecards has become imperative for the economic survival of the smallest of private enterprises.

**Employment Equity Act**

The Employment Equity Act was enacted to give effect to the right to equality in the context of the employment relationship. The Act places positive obligations on “designated employers” to prepare employment equity plans and implement affirmative action measures. Non-designated employers, while under no legal obligation to take steps towards the achievement of employment equity, would, however, be well-advised to prepare similar plans and implement similar measures voluntarily in order to secure a beneficial BEE rating.

Whether an employer takes affirmative action measures by virtue of a legal obligation in terms of the Employment Equity Act or voluntarily in order to secure a beneficial BEE rating, such affirmative action measures must comply with certain requirements in order to be regarded as valid. These measures must be rational, proportionate, fair and adequate and must be taken for the achievement of a valid purpose, such as the achievement of equal employment opportunities and equitable representation in the workplace.

In terms of the Employment Equity Act, it is up to the employer, in consultation with its employees, to set realistic targets and numerical goals for the achievement of equitable representation of suitably qualified people from designated groups in all occupational categories and levels of the workplace in that employer’s particular context.

**Beneficiaries of BEE**

It is important to note that there is some discrepancy between the beneficiaries of BEE in terms of the BEE Act, which aims at bringing about BEE in South Africa. These measures must be rational, proportionate, fair and adequate and must be taken for the achievement of a valid purpose, such as the achievement of equal employment opportunities and equitable representation in the workplace.

In terms of the Employment Equity Act, it is up to the employer, in consultation with its employees, to set realistic targets and numerical goals for the achievement of equitable representation of suitably qualified people from designated groups in all occupational categories and levels of the workplace in that employer’s particular context.

### Measurement and targets

The Employment Equity Scorecard set out in the Codes sets the following targets:

<table>
<thead>
<tr>
<th>MEASUREMENT CATEGORY &amp; CRITERIA</th>
<th>WEIGHTING POINTS</th>
<th>COMPLIANCE TARGET</th>
<th>APPLICABLE PRINCIPLE</th>
</tr>
</thead>
<tbody>
<tr>
<td>Black disabled Employees as a percentage of all employees using the Adjusted Recognition for Gender</td>
<td>2</td>
<td>3%</td>
<td>Years 0 – 5 Years 6 – 10</td>
</tr>
<tr>
<td>Black employees in Senior Management as a percentage of all such employees using the Adjusted Recognition for Gender</td>
<td>5</td>
<td>60%</td>
<td></td>
</tr>
<tr>
<td>Black employees in Middle Management as a percentage of all such employees using the Adjusted Recognition for Gender</td>
<td>4</td>
<td>75%</td>
<td></td>
</tr>
<tr>
<td>Black employees in Junior Management as a percentage of all such employees using the Adjusted Recognition for Gender</td>
<td>4</td>
<td>80%</td>
<td></td>
</tr>
<tr>
<td>Bonus point for meeting or exceeding the EAP targets in each category under 1 to 4</td>
<td>3</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

In terms of the Codes, no enterprise will receive any points under this scorecard unless it has achieved a sub-minimum of 42 percent of each of the targets set out above. It may, however, achieve bonus points if it meets or exceeds the Economically Active Population targets at a particular level.

In order to ensure consistency, the enterprise should, wherever possible, use the data that it files with the Department of Labour under the Employment Equity Act in calculating its score under this scorecard.

If the organisational structure of the enterprise does not distinguish between middle management and junior management, it is allowed to consolidate those categories against the targets for junior management. In these circumstances, the weighting points for the measurement categories are adjusted with senior management weighted at eight points and junior management weighted at six points.

A number of industry charts have developed their own unique method of calculation. For example, the Mining Charter states that the stakeholders aspire to a baseline of 40 percent participation by black people in management and to a baseline of 10 percent of women participation in the industry within five years of the coming into effect of the Mining Charter. The Mining Charter scorecard furthermore requires a yes/no answer to the question as to whether the enterprise has an employment equity plan. The Financial Sector Charter is more nuanced and prescribes certain targets for various employment categories together with the corresponding BEE rating which an enterprise will be awarded upon achievement of the prescribed goals. In the absence of a Sector Code, the Generic Scorecard, and the formulæ contained therein, will apply.
The inequitable distribution of skills in South Africa is a significant inhibiting factor to sustainable economic development. Only appropriately skilled personnel can cope with the changing technologies and add value to goods and services. Clearly, as a consequence of our past, the lack of skills is particularly acute within the African population. To redress these inequities and to improve the employment prospects of persons previously discriminated against, government has undertaken various legislative and other measures.

Through the Skills Development Act, the government seeks to improve the employment prospects of persons who were previously unfairly discriminated against. The Skills Development Act aims to achieve this primarily by the establishment of a financial and institutional framework which comprises of the National Skills Authority, approximately 27 SETAs, the National Skills Fund, the Skills Development Unit within the Department of Labour and various other institutions and new finance mechanisms. In terms of the Skills Development Levies Act, employers are required to contribute to the Skills Fund a total of one percent of the wage bill per annum. The monies can be claimed back by employers who are able to demonstrate that they have developed and implemented training programmes for their employees.

Skills development is one of the core elements of the Scorecard. In the Generic Scorecard, skills development has been given a weighting of 15 points. This reflects the centrality of skills development in the implementation of BEE. Statement 400 sets out a specific scorecard for skills development as a component of the Generic Scorecard. The Statement breaks down the score of 15 into two broad components: Skills Development Expenditure and Learnerships. The skills development expenditure component has a combined weighting of nine points whereas the learnership component has a weighting of six points.

The learnership programme matrix

The Scorecard recognises seven specific types of skills development programmes and learnerships:
- Institution-based theoretical instruction alone – formally assessed by the institution;
- Institution-based theoretical instruction as well as some practical learning with an employer or in a simulated work environment – formally assessed through the institution;
- Recognised or registered structured experiential learning in the workplace that is required after the achievement of a qualification – formally assessed by a statutory occupational or professional body;
- Occupationally directed instructional and work-based learning programme that requires a formal contract – formally assessed by an accredited body;
- Occupationally directed instructional and work-based learning programme that does not require a formal contract – formally assessed by an accredited body;
- Occupationally directed informal instructional programmes; and
- Work-based informal programmes.

The scorecard for skills development

<table>
<thead>
<tr>
<th>MEASUREMENT CATEGORY &amp; CRITERIA</th>
<th>WEIGHTING POINTS</th>
<th>COMPLIANCE TARGET</th>
</tr>
</thead>
<tbody>
<tr>
<td>Skills Development Expenditure on learning programmes identified in the Learning Programme Matrix as a percentage of Leviable Amount using the Adjusted Recognition for Gender</td>
<td>6</td>
<td>3%</td>
</tr>
<tr>
<td>Skills Development Expenditure on Learning Programmes specified in the Learning Programmes Matrix for black employees with disabilities as a percentage of Leviable Amount using the Adjusted Recognition for Gender</td>
<td>3</td>
<td>0.3%</td>
</tr>
</tbody>
</table>

The remaining six points are for learnerships. It must be noted that, to qualify, the learnerships must be those identified in categories B, C, and D of the Learning Programme Matrix.

Key Measurement Principles

Companies will only receive points on the skills development scorecard if they:
- Comply with the Skills Development Act;
- Have registered with the relevant SETAs;
- Have Workplace Plans; and
- Have implemented programmes targeted at developing Priority Skills generally and specifically for black employees.

Expenditure on bursaries and scholarships will not be taken into account where the grant is conditional or where the money can be recovered from the employee. The exception to this rule is where the condition is that the employee must complete the studies within the specified period failing which the grant must be repaid or that the employee must work for the employer for a period equal to that of the grant.

Expenditure on ABET programmes is recognisable at a multiple of 1.25 of the total value of the expenditure on skills development. Skills development from uncertified programmes or from informal training programmes at work cannot represent more than 15 percent of the total expenditure on skills development. Legitimate costs for training include:
- Costs for training materials;
- Costs of trainers;
- Costs of training facilities including costs of catering;
- Scholarships and bursaries; 
- Course fees;
- Accommodation and travel; and
- Administration costs.

Salaries or wages paid to an employee participating as a learner in any Learning Programme only constitute Skills Development Expenditure if the Learning Programme falls within categories B, C and D of the matrix.

Because of the use of the Adjusted Recognition for Gender in the measurement of the skills development element of BEE, the method of calculating Skills Development Expenditure will advantage companies with high expenditure on training programmes for black women.
Chapter Twelve

**BEE in state procurement and private procurement**

Claire Tucker

The BEE Act states that every organ of State and public entity must take into account and apply any relevant code of good practice issued in terms of the BEE Act in developing and implementing a preferential procurement policy.

State procurement was one of the first areas in which the State started insisting upon BEE. However, for the reasons discussed below, fronting and tokenism characterized the first wave of empowerment entities created to tender for State goods and services. In future, the “broad-based” approach discussed in Chapter One is to be used to evaluate the procurement has a strong affirmative element, and as a result, they will pressure their current suppliers to draw in black ownership. In this way, even companies who may not do business with the State or may not themselves have charter commitments, will find themselves having to comply with the State’s or charter’s affirmative procurement requirements.

**Preferential Procurement Act**

Section 217(2) of the Constitution provides that organs of State may implement policies that prefer black people when contracting for goods or services. The Preferential Procurement Act and the regulations promulgated under it were enacted to give effect to this provision. This Act addresses BEE in State procurement and regulates the allocation of government tenders by organs of State; this allocation is based on a points system which operates according to formulae set out in the regulations.

The term of “Historically Disadvantaged Individual” is used in the Preferential Procurement Act rather than the term “black” which is used in the BEE Act, but the terms are practically interchangeable. The Preferential Procurement Act does not apply a “scorecard” approach to the evaluation of the BEE status of an entity but rather focuses largely on whether the ownership and control of the tendering entity is black, or whether part of the contract will be subcontracted to a black entity. In this respect the following definitions are used: An organisation that is more than 50,1 percent black owned and controlled, is classified as black; one that has between 25 percent and 50,1 percent black ownership and control is classified as a black empowered company; while enterprises with black ownership and control that is between five percent and 25 percent are considered black influenced.

The Preferential Procurement Act and Regulations also consider the extent to which the entity procures from black companies, black empowered companies and black influenced companies in their own contracts for goods and services, as a proportion of their total procurement, and extra points can be earned for vague undertakings such as the promotion of South African owned enterprises, the creation of new jobs or the intensification of labour absorption and the empowerment of the work force.

In due course this statute should be repealed and replaced with a statute which is in line with the approach adopted in the Codes.

**“Fronting” in relation to tenders**

The Codes remove the detailed provisions that were found in draft versions regarding fronting. This is a practice most often found in State tenders where suppliers create relationships with black persons to give the impression that the supplier is owned or controlled by black persons when in fact this is not the case. All the Codes say in this regard is that “any misrepresentation or attempt to misrepresent any enterprise’s true B-BBEE Status may lead to the disqualification of the entire scorecard of that enterprise.”

The provisions of the draft codes were more detailed than this and provided examples of fronting, as well as a number of high risk and moderate risk indicators of fronting. The draft codes gave the following examples of fronting:

- **Window-Dressing:** This includes cases in which black people are appointed or introduced to an enterprise on the basis of tokenism and may be:
  - discouraged or inhibited from substantially participating in the core activities of an enterprise; and
  - encouraged or inhibited from substantially participating in the stated areas and/or levels of their participation.

- **Benefit Diversion:** This includes initiatives implemented where the economic benefits received as a result of the BEE status of an enterprise do now flow to black people in the ratios as specified in the relevant legal documentation.
Opportunistic Intermediaries: This includes enterprises which have concluded agreement with other enterprises with a view to leveraging the opportunistic intermediary’s favourable BEE status in circumstances where the agreement involves:

- significant limitations or restrictions upon the identity of the opportunistic intermediary’s suppliers, service providers, clients or customers;
- the maintenance of their business operations in a context reasonably considered improbably having regard to resources; and
- terms and conditions which are not negotiated at arm’s length on a fair and reasonable basis.

The draft codes also set out high and moderate risk indicators of fronting:

**High Risk indicators**

- the black people who serve in executive or management positions in an enterprise are paid significantly lower than the market norm, unless all executive or management of an enterprise are paid at a similar level;
- an enterprise only performs peripheral or marketing functions and performs no other significant operational functions as would be reasonably expected from such an enterprise;
- an enterprise relies on a third-party to conduct the majority of core functions normally conducted by enterprises similar to an enterprise;
- an enterprise cannot operate independently without a third party, as a result of contractual obligations or the lack of technical or operational competence; and
- any practice which circumvents or attempts to circumvent Codes.

**Moderate risk indicators**

- the black people identified by an enterprise as its shareholders, executives or management have limited knowledge of an enterprise;
- there is no significant indication of active participation by black people identified as top management at strategic decision making level;
- an enterprise pays management or administration fees to a related person or shareholder with no BEE status;
- an enterprise acquires goods and/or services at a significantly different rate than market from a related person or shareholder (transfer pricing);
- an enterprise obtains loans, not linked to the share acquisition, from a related person at an excessive rate; and
- an enterprise shares all premises and infrastructure with a related person, or with a shareholder with no BEE status or a third-party operating in the same industry where the cost of such premises and infrastructure is disproportionately to market related costs.

**Preferential procurement in the Codes**

Preferential procurement is dealt with in Code 500. The Scorecard accords 20 points out of 100 to preferential procurement and the number of these points that an enterprise may claim is calculated by determining the percentage of procurement from enterprises with a good BEE rating.

The table sets out the criteria for deriving a score for preferential procurement.

The BEE Procurement recognition level is derived from the score of the enterprise in terms of the whole of the Generic Scorecard. This is a move away from the measurement of procurement from black-owned or controlled suppliers – as is still the case in terms of the Preferential Procurement Act discussed above. Procurement from such suppliers is still recognised and accorded additional points.

<table>
<thead>
<tr>
<th>MEASUREMENT CATEGORY &amp; CRITERIA</th>
<th>WEIGHTING POINTS</th>
<th>COMPLIANCE TARGET</th>
<th>APPLICABLE PRINCIPLE</th>
</tr>
</thead>
<tbody>
<tr>
<td>B-BBEE Procurement Spend from all Suppliers based on the B-BBEE Procurement Recognition Levels as a percentage of Total Measured Procurement Spend</td>
<td>12</td>
<td>50%</td>
<td>70%</td>
</tr>
<tr>
<td>B-BBEE Procurement Spend from Qualifying Small Enterprises or Exempted Micro-Enterprises based on the applicable B-BBEE Procurement Recognition Levels as a percentage of Total Measured Procurement Spend</td>
<td>3</td>
<td>10%</td>
<td>15%</td>
</tr>
<tr>
<td>B-BBEE Procurement Spend from of the following suppliers as a percentage of Total Measured Procurement Spend:</td>
<td>5</td>
<td>15%</td>
<td>20%</td>
</tr>
<tr>
<td>• Suppliers that are 50% black owned (three out of five points); or</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>• Suppliers that are 30% women owned (two out of five points)</td>
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**Calculating Total Measured Procurement Spend**

The following procurement is measurable or included within Total Measured Procurement Spend:

- Cost of sales;
- Operational expenditure;
- Capital expenditure;
- Public sector procurement;
- Monopolistic procurement;
- Third-party procurement;
- Labour brokers and independent contractors;
- Pension and medical aid contributions;
- Trade commissions;
- Empowerment related expenditure;
- Imports; and
- Intra-group procurement (with some exceptions).

**Exclusions from Total Measured Procurement Spend**

The following list sets out the only permissible exclusions from Total Measured Procurement Spend:

- Taxation;
- Public sector procurement;
- Salaries, wages, remunerations, and emoluments;
- Pass-through third-party procurement, i.e. all procurement for a third party or a client that is recorded as an expense in the third party or client’s annual financial statements but is not recorded as such in the measured entity’s annual financial statements;
- Empowerment related procurement; and
- Imported goods and services, subject to certain requirements.
One of the major criticisms of the Draft Codes of Good Practice was that they failed to sufficiently encourage grass-roots or broad-based development initiatives. The final Codes seek to address that concern through the final two elements on the Generic Scorecard: Enterprise Development and Socio-Economic Development. Enterprise Development was an element under the Draft Codes, but its weighting is now significantly increased. Socio-Economic Development replaces the “residual” element under the Draft Codes.

Many companies concentrate on the ownership and management components of BEE, given that these are often the most visible dimensions of a company’s commitment to BEE. However, the Codes adopt a broader approach, and scoring on the elements of Enterprise Development and Socio-Economic Development is, unlike most of the other elements, largely in the hands of companies – they are scored for what they do, not for what they are. These elements therefore provide an opportunity for companies which find it difficult to score optimal points on procurement, ownership and management, such as wholly-owned subsidiaries of foreign companies, or highly specialised companies in areas where there is a skills shortage, to score well on the Generic Scorecard.
Enterprise Development

Enterprise Development is allocated a significant weighting of 13 points on the Generic Scorecard. The criteria for the allocation of these 13 points consist of the average annual value of all Enterprise Development contributions and sector-specific programmes made by the measured entity as a percentage of the target. The target is three percent of the entity’s net profit after tax.

Measured entities receive recognition for any qualifying Enterprise Development contributions that are quantifiable as a monetary value using a Standard Valuation Method. They may be monetary or non-monetary, recoverable or non-recoverable. Some examples of such contributions are grants, investments, loans, guarantees or other security, credit facilities, enterprise development and the provision of training or mentoring.

Qualifying contributions are recognizable cumulatively from either the commencement date of the Code or from an earlier date chosen by the entity. Where contributions commenced after the commencement date of the Code, they must be in terms of a written agreement between the measured entity and the beneficiary.

The Codes include a non-exhaustive list of enterprise development contributions, amongst others:
- Grant contributions to beneficiaries;
- Investments in beneficiary entities;
- Loans made to beneficiary entities;
- Guarantees given or security provided on behalf of beneficiaries;
- Credit facilities made available to beneficiary entities;
- Direct costs incurred by a measured entity in assisting and hastening development of beneficiary entities;
- Overhead costs of measured entity directly attributable to enterprise development contributions;
- Enterprise development or developmental capital advanced to beneficiary entities;
- Preferential credit terms granted by a measured entity to beneficiary entities;
- Contributions made to settling service costs relating to the operational or financial capacity or efficiency levels of a beneficiary entity;
- Payments made by the measured entity to third parties to perform enterprise development on its behalf;
- Discounts given to beneficiary entities in relation to the acquisition and maintenance costs associated with the grant to those beneficiary entities of franchise, licence, agency, distribution or other similar business rights;
- The creation or development of capacity and expertise for beneficiary entities needed to manufacture or produce goods or services previously not manufactured, produced or provided in South Africa;
- Facilitating access to credit for beneficiary entities;
- Provision of training or mentoring to beneficiary entities; and
- Maintenance by the measured entity of an enterprise development unit which focuses on support of beneficiary entities.

The Codes provide a formula, in terms of which qualifying contributions are scored. In addition, the Codes provide for a benefit factor matrix, in terms of which qualifying contributions are quantifiable as a monetary value using a Standard Valuation Method. Examples of such contributions include grants, guarantees or security, developmental capital, preferential terms for the supply of goods or services to beneficiary entities; contributions to settling service costs relating to the operational or financial capacity or efficiency levels of a beneficiary entity; payments made by the measured entity to third parties to perform enterprise development on its behalf; discounts given to beneficiary entities in relation to the acquisition and maintenance costs associated with the grant to those beneficiary entities of franchise, licence, agency, distribution or other similar business rights; the creation or development of capacity and expertise for beneficiary entities needed to manufacture or produce goods or services previously not manufactured, produced or provided in South Africa; facilitating access to credit for beneficiary entities; provision of training or mentoring to beneficiary entities; and maintenance by the measured entity of an enterprise development unit which focuses on support of beneficiary entities.

Conclusion

Together, these two elements count for 20 percent of the possible 100 points available to companies on the Generic Scorecard. As stated, these are “soft” elements as compared to ownership, management and procurement, elements which are often difficult (for different reasons) for companies to score well on. In contrast, contributions to Socio-Economic Development and Enterprise Development require only commitment of time and resources from companies. Contributions of this sort also have the advantage of having a visible impact on the communities – this has obvious social value, and may also benefit companies’ public relations profiles.
Chapter Fourteen

BEE verification agencies
Anne McAllister

In the past, each time a supplier tendered to provide goods or services to an entity a “BEE questionnaire” was sent to establish the level of compliance by the supplier with a wide range of BEE-related questions. This generally bore very little similarity to any of the other BEE questionnaires which the supplier had completed.

The Codes aim to address this by:
• Creating a consistent scorecard against which all enterprises can be measured;
• Providing for BEE-verification agencies to conduct BEE accreditations in terms of the measurements set out in the Codes; and
• Providing for the Minister to issue verification standards which will be applied consistently by the accredited agencies.

A draft version of the Codes, published in November 2005, set out principles for the approval, accreditation and regulation of BEE-verification agencies. Most of these did not find their way into the final Codes. The principles underpinning qualification and functioning of accreditation agencies are still to be developed.

Accreditation of agencies

It is intended that:
• Only accredited verification agencies may issue BEE-verification certificates; and
• The accreditation process will be developed, maintained and enforced by the SANAS on behalf of the DIT or any other body appointed by the Minister for this purpose from time to time.

No verification agency has yet been accredited. SANAS has set up a Specialist Technical Committee to prepare the verification standards, which are still in draft form.

Charter Councils

The Codes also make provision for the establishment of “Industry Bodies” to provide guidance to the verification industry through the development and maintenance of high quality and reliable BEE-verification services. The Industry Bodies will work with the DIT to develop verification methodology and other relevant practices that will be used as standards by all verification agencies. These Industry Bodies are commonly called Charter Councils. An example of such a council is found in the Financial Sector Charter.

BEE certificates

The Codes contemplate two sorts of certificate: a narrow-based certificate which may be issued on request during the transitional period of one year following publication of the Codes and which only measures ownership and control; and a broad-based certificate which will apply after the transitional period and which will measure BEE-performance on all of the aspects of the Scorecard.

The DIT, together with SANAS, will implement such mechanisms as may be necessary to ensure that verification certificates are accurate and reliable. A publicly accessible central database will publish the information and criteria underlying each verification certificate.
Chapter Fifteen

Overview of sector charters

Claire Tucker

The BEE Act allows for business groups and interest groups within each particular sector, in partnership with the government, to devise a charter and scorecard for that particular sector. This is to ensure that there is “buy-in” as to what is attainable from a BEE perspective within the sector and that the particular needs of each individual sector are considered when the sector specific targets are set. The BEE Act provides that if government is happy with the sector specific scorecard it can be published and it then becomes the benchmark against which BEE in that sector is evaluated for all government purposes.

There is, however, a big distinction between a Transformation Charter which is published in terms of section 12 of the BEE Act “for general information” and a Sector Code which is published in terms of section 9 of the BEE Act as a binding mechanism for measuring BEE.

Statement 003 of Code 000 explains that the gazetting of a Transformation Charter under section 12 of the Act is evidence of the commitment to promote BEE in the applicable sector and is not binding on organs of state or public entities. Code series 000 to 700 and any statements under those Codes remain applicable to enterprises in the sector, despite the gazetting of their Transformation Charter under section 12 of the Act. By contrast, a Sector Code published in terms of section 9 enjoys equal status with that of any other Code.

At the time of writing only a Financial Sector Charter, a Construction Sector Charter and a Property Sector Charter had been published. All of these were published in terms of section 12 of the BEE Act, as such these are mere statements of intention and will not form the basis for evaluation of the companies to which they apply by state entities and departments, for example in the tender context.

In certain sectors, such as mining and telecommunications, BEE criteria in licensing are not derived primarily from the BEE Act but rather from the statute governing operations and empowering the grant of the licence in that particular sector. Where this sector specific legislation is silent on an issue of interpretation or measurement of BEE, the general approach is to have regard to the Codes. This approach is reinforced by section 10 of the BEE Act which provides that every organ of state and public entity must take into account and, as far as is reasonably possible, apply any relevant code of good practice issued in terms of the Act in:

- Determining qualification criteria for the issuance of licences,
- Determining and implementing a preferential procurement policy;
- Determining qualification criteria for the sale of State-owned enterprises; and
- Developing criteria for entering into partnerships with the private sector.

In this section we discuss the manner in which BEE is dealt with in particular in the financial, construction, property, mining and telecommunications sectors, as these are the sectors in which there are final and binding guidelines. Many other sectors have BEE charters under discussion, including the legal profession, agriculture, health, media and advertising. Most of these charters impose higher ownership and other targets than those found in the Codes. As there is still a lot of debate in these sectors regarding what the BEE targets and measurement criteria will ultimately be, we have not dealt with these draft charters.
Overview of the financial sector charter

Ashleigh Hale

The financial services sector includes banks, long- and short-term insurers, reinsurers, managers of collective investment schemes in securities, investment managers who manage funds on behalf of the public including retirement funds, members of any exchange licensed to trade equities or financial instruments in South African and entities listed as part of the financial index of a licensed exchange.

The financial services sector includes banks, long- and short-term insurers, reinsurers, managers of collective investment schemes in securities, investment managers who manage funds on behalf of the public including retirement funds, members of any exchange licensed to trade equities or financial instruments in South African and entities listed as part of the financial index of a licensed exchange.

FSC was adopted by the sector in October 2003 and was gazetted in February 2007 as a transformation charter in terms of section 12 of the BEE Act. The Charter is not binding on State entities or departments measuring the BEE status of the enterprise. The Codes remain applicable to such an evaluation.

Application of the FSC

The BEE targets contained in the FSC came into effect on 1 January 2004 and will remain in place until 31 December 2010. There will be a mid-year review of the Financial Services Sector in 2009 (based on the reports for the year ended 31 December 2008) and a comprehensive review in 2015. It must be noted that this approach is out of line with the Codes which explicitly do not provide for an “end date” for empowerment.

Businesses which have less than R10 million of designated investments and less than 10 employees, are exempt from compliance with the FSC. If a company has more than R10 million of designated investments but less than 10 employees, it will only be exempt from the human resource development provisions contained in the FSC.

FSC Targets

The FSC sets a minimum target of 25 percent black ownership by 2010 of the South African operations of companies subject to measurement under the Charter, measured at a holding company level, of which 10 percent must be directly owned by black persons, with an option to achieve the remaining 15 percent target through direct or indirect ownership by black persons. The FSC sets the following additional targets:

- **Access to Financial Services:** to ensure that 80 percent of the poorest people in South Africa gain effective access to financial services by 2008 and 0.2 percent of after-tax profits per annum to consumer education.
- **Employment Equity:** to achieve employment equity levels by 2008 as follows:
  - 25% black representation at executive level (4% black women).
  - 20%-25% of black people at senior level (4% black women).
  - 40%-50% of black representation at junior level (15% black women).
  - 50% of black representation at middle level (15% black women).
  - 40%-50% of black representation at board level (11%, black women).
- **Skills Development:**
  - To spend 2.5 percent of payroll per year on training black employees; and
  - To employ in registered training institutions up to 4.5 percent of total staff in the form of black learners.
- **Procurement and Enterprise Development:** 50 percent of the value of all procurement spend should be to BEE accredited companies by 2008 and 70 percent by 2014.
- **Empowerment and Financing:** any enterprises can make a minimum of R75 billion available for “empowerment financing”.
- **Corporate Social Investment:** to allocate 0.5 percent per annum of post-tax operating profits on corporate social investments such as education, training, development programmes, environment, job creation, arts and culture, health and sport.
MPRDA commenced on 1 May 2004. It is one of the few statutes that stipulates specific stand-alone requirements regarding BEE.

As prescribed by the MPRDA, the DME developed the Mining Charter as an empowerment Charter for the Mining Industry, together with a scorecard for evaluating compliance. The Mining Charter, recognises that as a result of South Africa’s past racially discriminatory practices, black people, mining communities and women have been largely excluded from participating in the mining industry. It also recognises that to give effect to the fundamental right to equality, active steps must be taken to redress inequality.

Reference is made in the Mining Charter to HDSa ownership by licence holder. The audit of this requirement generally takes place during the annual audit of the social and labour plan. Section 100(b) provides that the Mining Charter must set out how the objectives referred to in section 26(i) and (f) are to be met. As such, in taking a decision which requires the consideration of these objectives the Minister must have regard to the Mining Charter. The Minister is not bound only to what is set out in the Mining Charter to determine if the objectives of the MPRDA, particularly section 26(i) are met. As such the Mining Charter is not the only reference for interpreting the BEE requirements of the MPRDA.

The Mining Charter is very vague and difficult to interpret as a stand-alone document and the DM does refer to the Codes published in terms of the BEE Act when interpreting the Mining Charter. Particularly difficult to understand are the provisions regarding ownership and control of mining companies by black people. The provisions regarding broad-based trusts and the provisions regarding joint ventures are the provisions regarding BEE.

Application of the Mining Charter

The Mining Charter has as its main purpose the transformation of the mining industry in line with the socio-economic developments that are already taking place in South Africa. It does not merely set standards for the actual mining of minerals, but targets the whole mining operation by setting standards regarding living conditions, skills development and non-discrimination regarding migrant workers and affirmative action.

Ownership, participation and employment equity

The Mining Charter sets out the framework, targets and timetable for entry of HDSa into the mining industry. It requires that the expanding minerals sector changes its demographics so that 40 percent of all levels of management and operational control are occupied by HDSa within a period of five years. Women specifically are to be employed at all levels within the sector and must occupy 10 percent of positions at all levels within five years.

The Mining Charter also requires mining companies to achieve 26 percent black ownership of each mining company by 2014 and 15 percent by 2009. It provides that this can be through either active or passive involvement but, as with most provisions of the Mining Charter, it is difficult to understand precisely what is allowed or required from a combination of active and passive ownership.

Any company or individual with mining or prospecting rights has five years from 1 May 2004 to convert their mining rights under the MPRDA (other periods applied for unused rights and prospecting rights). When applying for a converted right, a scorecard approach is adopted by the DME. A company does not have to score full marks on all aspects of the scorecard. If, for instance, a company has not complied with a standard set in one category, it can “break even” if it has complied extensively in the other categories. If the company has not complied in an individual category, it has to give reasons for such non-compliance and state the steps that are to be taken in order to comply.

The Mining Charter is not a blue-print, but a rough guide that must be tested on a case-by-case basis.

References

Claire Tucker

The mining charter

Chapter Seventeen
BEE in the telecommunications and broadcasting sector

Livvia Dyer & James Linscott

BEE plays an important role in the communications and broadcasting sector in South Africa. This is particularly because services in this sector are generally required to be licensed and the regulatory authority takes BEE into account when awarding licences, in accordance with the BEE Act and the legislation that specifically regulates the sector.

The telecommunications sector is regulated primarily in terms of the Electronic Communications Act. The Electronic Communications Act provides for the licensing of broadcasting services, electronic communications services and electronic communications network services by ICASA.

Section 2(h) of the Electronic Communications Act provides that one of its primary objects is to promote the empowerment of historically disadvantaged persons, including black people, with particular attention to the needs of women, opportunities for youth and challenges for people with disabilities. Section 2(k) provides that another of the principal objects of the Electronic Communications Act is to ensure that broadcasting services and electronic communications services, viewed collectively, are provided by persons or groups of persons from a diverse range of communities in South Africa.

Section 5(9) of the Electronic Communications Act provides that, in granting a licence, ICASA must ensure that services, viewed collectively, are provided by persons or groups of persons from a diverse range of communities in South Africa, and promote the empowerment of historically disadvantaged persons, in accordance with the requirements of the draft Information and Communications Technology Empowerment Charter. BEE is thus a key criterion in considering applications for licences.

Conditions relating to empowerment have also been specified in the licences of operators to whom ICASA has awarded licences, as required by the policy direction issued by the Minister of Communications on 21 August 2001. For example, historically disadvantaged persons are required to hold, exercise all voting rights and be entitled to dividends in respect of a minimum of 40 percent of the issued share capital in Cell C, one of South Africa’s mobile phone operators, and to appoint a minimum of 40 percent of the members of the board of directors. Cell C is also required to obtain approval from ICASA where any transfer of shares or change in ownership will have the effect that 10 percent or more of its issued share capital held by historically disadvantaged persons, will be transferred, or where there is a change in a quarter or more of the membership of the board of directors. Cell C is also required to support independent contractors from historically disadvantaged groups and to support industry development initiatives.

The Minister of Communications’ policy direction also requires that ICASA develops the necessary criteria to give priority, when awarding licences, to historically disadvantaged persons. ICASA was also directed to make regulations for all operators, service providers, equipment suppliers and vendors regarding their contribution to the economic empowerment of historically disadvantaged persons.

ICASA has also made regulations regarding the limitation of ownership or control interests of historically disadvantaged persons. The regulations require licences to maintain records reflecting the ownership and control interests of historically disadvantaged persons and to support industry development initiatives.

BEE in the telecommunications and broadcasting sectors will also be facilitated through the operation of the ICT Charter, which is in the process of being developed by stakeholders in the ICT sector. The ICT Charter will include guidelines for BEE and a scorecard for empowerment in ICT industries, and will establish an ICT BEE Council which will implement, monitor and enforce the objectives of the Charter. The ICT Charter addresses the transformation indicators of equity ownership, management and control, skills development, employment equity, enterprise development and preferential procurement specifically as they relate to the ICT sector. A number of objectives, aimed at promoting the involvement of black people and black-owned and controlled enterprises, are put forward in relation to each of these indicators. The challenges which presently impede the involvement of black people and enterprises in each of the indicated activities are also examined.
The construction sector charter

There is little doubt that there has been a rapid upsurge in the construction industry and all indications are that this momentum will continue for at least the next five years, taking into account the 2010 World Cup, the construction of the Gautrain, the demands being placed on Eskom to increase electricity supply, the need to make our ports and railways more accessible, etc. All of this suggests that our construction industry is experiencing a boom, and will no doubt attract the attention of new players in the market, including multinationals, who will be looking at building strategic alliances in order to give them the best advantage when tendering for such work. One of the obvious factors that would need to be considered when forming such strategic alliances would be BEE.

The Construction Sector Charter and its scorecard were recently published in terms of section 12 of the BEE Act. As such, they are not binding on State entities and departments in evaluating BEE status. The Codes remain the primary mechanism for measuring BEE of affected enterprises.

Application

The Construction Sector Charter applies to all enterprises that are involved in the creation, expansion and/or maintenance of fixed assets related to residential or non-residential buildings, infrastructure or any other form of construction work in South Africa. In the event that the construction enterprise conducts over 60 percent of its core activities in the construction industry, the enterprise will be required to report on all activities. The implementation of the Construction Sector Charter will be monitored by the Construction Charter Council by means of annual reports submitted by each enterprise detailing its progress.

The Construction Sector Charter makes provision for an enterprise to apply for an exemption from any provision of the Construction Sector Charter. The relevant enterprise must submit evidence to the Charter Council supporting such exemption.

Ownership

The Construction Sector Charter bases its measurement of ownership on the provisions of the Codes and in particular, Code 100. These provisions are discussed in detail above.

In addition, where ownership is through a broad-based scheme this is viewed as “unencumbered”; this appears to mean that loans used to finance such an acquisition will be ignored for measurement purposes.

We discuss equity equivalents in Chapter Six of this Guide. In addition, the Construction Charter Council plays a role in directing equity equivalent investments towards construction related needs.

Control

In terms of the Construction Sector Charter, the sector is committed to achieving 40 percent black people at board level of which 20 percent are black women, by December 2013. The Construction Sector Charter further commits the sector to comply with the requirement of 25 percent black people at executive level in 2010 (10 percent of which should be women) and 40 percent at executive level by 2013 (16 percent of which should be women).

Employment Equity

The Construction Sector Charter commits the sector to achieving the following targets by December 2010:

• 25 percent black people in senior management and 40 percent black people in senior management by 2013; 10 percent of which should be black women by December 2010 and 16 percent by December 2013.

• 30 percent black people in middle management by December 2010 and 40 percent black people in middle management by December 2013, of which 12 percent should be black women December 2010 and 16 percent by December 2013.

• 65 percent black people in junior management by December 2013, 27 percent of which should be black women by that date.

Enterprises are required to submit their Employment Equity Plans and Certificates of Compliance together with their annual BEE reports. The Construction Sector Charter states that non-compliance with the Employment Equity Act will result in a zero score for employment equity in terms of the Charter scorecard.

Skills development

The Construction Sector Charter acknowledges that the construction sector consists of a largely low-skilled labour force and limited numbers of highly skilled professionals, which are in very short supply. As a result of this, the construction sector has committed to achieving the following targets:

• 1,5 percent of the annual payroll must be spent on skills development;

• 70 percent of the total skills development spent must be directed towards black people;

• 25 percent of skills development spent on black people must be directed towards women;

• 25 percent of skills development spent on black people must be directed towards black management;

• 2,5 percent of employees must be learnerships, calculated on a rolling 12-month average;

• 70 percent of total learnerships must be black people;

• 35 percent of learnerships for black people must be black women;

• 30 percent of learnerships for black people must be from designated groups; and

• 0,3 percent of the payroll must be directed towards bursary expenditure for black students.

The Construction Sector Charter also commits the sector to implementing an improved and verified mentorship programme. Proof of submission of a workplace skills plan and implementation report must be included in the annual BEE report. In this regard, non-compliance with the requirements of the Skills Development Act will result in a zero score for skills development in terms of the Charter scorecard.

In order to address the skills development problem and to improve the institution framework, the Charter undertakes to:

• Promote the awareness of career opportunities in the Construction Sector and provide education and career guidance aimed at increasing the success rate of students in this field and improving access to training opportunities;

• Establish interaction between the sector, the relevant SETA and tertiary institutions to foster appropriate skills transfer and facilitate the accreditation of various workplace training initiatives; and

• Increase or attempt to increase the levels of retention using effective workplace training and career development and effective succession planning.

The Charter further envisages the development of mechanisms to certify in-house training and to provide for the recognition of prior learning of employees where the enterprise is not a certified training provider.
**Procurement**

The Construction Sector Charter commits the sector to 70 percent procurement spend from BEE suppliers by December 2013.

**Enterprise development**

Enterprise development is aimed at supporting the development of businesses owned and managed by women as well as other black enterprises to ensure higher levels of sustainability and increased levels of black ownership in the Sector. The Charter states that enterprise development programmes should be conducted. They will include the following:

The Construction Sector Charter commits the sector to achieving a target of five percent of the total annual turnover on enterprise development by December 2013.

**Corporate social investment**

The Construction Sector Charter commits the sector to utilising resources to initiate and contribute to corporate social investment projects that will primarily benefit black people and promote development in under-resourced areas. The Construction Sector Charter commits the sector to achieving a target of 0.25 percent by December 2013 of the annual payroll which will be spent on corporate social investment projects.

**Conclusion**

Enterprises currently operating in the construction industry will be required to submit an independently audited report from an accredited verification agency to the Charter Council in March 2008. Enterprises are now in a position to put together a holistic six-year plan which will address the various components of the Charter and set aside the necessary funding for this. Any such plan must take into account the government’s Accelerated Shared Growth Initiative for South Africa and any other relevant policies of government and/or parastatals considering government’s drive to directing funds and resources to infrastructure development.
Chapter Twenty

The property sector charter

Nikki Stein

The Property Sector Charter was gazetted in terms of section 12 of the BEE Act on 5 October 2007, and came into operation on that date. As such, it is not binding on State entities and departments in evaluating BEE status. The Codes remain the primary mechanism for measuring BEE of affected enterprises.

The Charter acknowledges the challenges particular to the property sector, particularly the historical use of property ownership and denial of access to productive land as a tool in the apartheid era. Black people have been prejudiced in ownership of property, as well as in their participation in the property market.

The Charter also seeks to address the issue of participation by black people, particularly black women, in ownership and control of the entities which own property, thereby bringing these people into the realm of development, management and sales.

The minimum procurement targets to be reached within five years of the Charter coming into operation are 70% of eligible procurement spend from BEE enterprises and 40% of eligible procurement spend on property services enterprises with a BEE status of Level One to Level Four. In addition to these minimum targets, each enterprise is required to implement a preferential procurement policy which promotes procurement from BEE enterprises and small and micro-enterprises.

Procurement

The parties to the Property Sector Charter have committed to utilising the resources at their disposal to initiate and contribute to corporate social investment projects that benefit black groups, communities and individuals and that promote transformation and development. In this regard partnerships will be formed with the private sector and government structures to enhance assistance and support to the communities.

Conclusion

The objects of the Property Sector Charter extend beyond empowerment within entities within the sector to addressing broader issues of ownership and resources. The sector sees itself as important in redressing the denial of beneficial ownership of land that was one of the key elements of the apartheid era. It seeks to reform the entities in the property sector as well as the broader communities affected by the property sector.

Application of the Property Sector Charter

The Charter applies to the South African property sector, and in particular to all enterprises engaged in property ownership or the provision of property services. This includes, without limitation, all practitioners and enterprises dealing in property development.

Enterprises which fall within a group that is bound by another charter will be bound by the Property Sector Charter if the primary business of the subsidiary, division or business unit within the group is in property.

Entities may claim exemption from specific provisions in the Charter, and special treatment is given to micro and very small enterprises and small enterprises.

Ownership, representation and equity

The Charter seeks to address low levels of black ownership in property owning enterprises and in property services, as well as unlocking obstacles to ownership by black people of property assets. Within five years of the Charter coming into operation, the sector has committed to targets of 25% economic interest held by black people and 25% plus one vote participation by black people in voting rights; 10% economic interest held by black women and 10% participation by black women in voting rights; and 2.5% participation in ownership by broad-based ownership schemes and designated groups.

The targets set for representation at board level and at executive management level within five years of the Charter coming into operation are 40% black people at board level; 20% black women at board level; 40% black people at top management level and 13% black women at top management level.

On the issue of employment equity, the Charter sets targets for the five years from the date of commencement of the Charter in respect of enterprises in the property sector in general on the one hand, and property brokerages and residential estate agencies, who do not differentiate various management levels, on the other. Property brokers and residential estate agents commit to the targets of 30% black people at management level; 15% black women at management level; 37.5% black practitioners and 26% black women practitioners.

All other entities in the property sector commit to the targets of 30% black people and 15% black women in senior management; 37.5% black people and 20% black women in middle management; and 40% black people and 20% black women in junior management.

Skills and enterprise development

The parties to the Property Sector Charter have undertaken to develop a programme outlining the actions to address structured skills development, within six months of the effective date of the Charter. The programme is to be designed in partnership with the sector and all sector regulatory bodies, academic institutions and government.

The Charter sets the following targets for skills development: 1.5% of the payroll per annum, in addition to the skills development levy, on skills development of black people; 2.5% of staff in learnerships for black people; and 2.5% of staff in mentorships for black people.

Enterprises are also required to submit a workplace skills plan to be implemented.

The Charter also sets targets for comprehensive enterprise development. These targets are 3% of net profit before taxation on monetary enterprise development; and 2% of net profit before taxation on non-monetary enterprise development. In addition, enterprises commit to target 35% of property disposals to Level - One to Level - Four BEE enterprises over a five-year period.

Corporate social investment

The parties to the Property Sector Charter have committed to utilising the resources at their disposal to initiate and contribute to social investment projects that benefit black groups, communities and individuals and that promote transformation and development. In this regard partnerships will be formed with the private sector and government structures to enhance assistance and support to the communities.
The petroleum and liquid fuels industry charter

The Petroleum and Liquid Fuels Industry Charter (“the Liquid Fuels Charter”) is based on the equality provisions of the Constitution, relevant legislation and the Energy Policy White Paper’s stated objective to achieve “sustainable presence, ownership or control by historically disadvantaged South Africans”. The Liquid Fuels Charter sets out an agreed framework for BEE aspects of the Liquid Fuels Industry.

In 2003, the Petroleum and Liquid Fuels Industry Charter was incorporated into the Petroleum Products Act. Unlike the Mining Charter, the Liquid Fuels Charter was not specifically developed in terms of the Petroleum Products Act and its status is unclear. It is not specifically incorporated into the licensing processes undertaken in terms of the Petroleum Products Act and related legislation, nevertheless a statement regarding compliance with the Liquid Fuels Charter is generally required in practice as part of the licensing process. At present the Liquid Fuels Charter has the status of an unpublished sector transformation charter and companies in the sector would still be evaluated for most purposes in terms of the Generic Scorecard.

Application of the Charter

The Liquid Fuels Charter applies to the privately owned parts of the industry, and in all parts of the value chain including exploration and production of oil, liquid fuels, pipelines; single buoy moorings; depots and storage tanks; oil refining and synthetic fuel manufacturing plants, including lubricants; transport, including road haulage and coastal shipping; and trading, including import and export, wholesale and retail assets/infrastructure.

Government has undertaken in terms of this Charter to deal with State assets in a manner that promotes the objectives of the White Paper on Energy Policy and the Liquid Fuels Charter.

Capacity building

According to the Liquid Fuels Charter, the South African labour market does not produce enough of the skills required by the petroleum industry, particularly with regard to historically disadvantaged oil companies. The Liquid Fuels Charter therefore provides that the industry and government should work together in addressing this skills gap. Government has endeavoured to secure training opportunities as well as exchange opportunities with oil companies operating outside South Africa. Similarly, the industry has undertaken to build employee skills and to report annually on progress, working together with SETA in the development of skills development strategies.

Equity and procurement

The Liquid Fuels Charter requires that employment equity targets and achievements must be published. In achieving these targets, parties are required, at a minimum, to fast track an identified talent pool inclusive of gender, to implement mentorship programmes and to set demanding targets. Overseas placement and/or training programmes must be focused on historically disadvantaged South Africans.

In the realm of private-sector procurement, supportive and preferred procurement policies must facilitate the growth of HDSa companies in terms of goods and services using aids such as listed suppliers, which may be published by the government on the internet and updated regularly, whilst maintaining all prescribed health, safety and environmental standards.

Public-sector procurement, on the other hand, will be achieved through government engaging with State Tender authorities and demanding compulsory compliance with White Paper equity milestones.

In order to break down the barriers preventing equity, various upstream and downstream undertakings and considerations are provided for in the Liquid Fuels Charter. Parties have agreed to create fair opportunity for entry to the retail network and commercial sectors by HDSa companies. To avoid the situation where emerging companies are unable to compete due to inability to access large infrastructure, the Liquid Fuels Charter requires that the owners of these large infrastructure facilities provide third parties non-discriminatory access to uncommitted capacity. Further in this regard, HDSa companies are to be given fair opportunity to acquire ownership in such facilities. In the same vein, to avoid the situation where HDSa companies cannot access refining capacity, oil refiners and fuel manufacturers are prompted to consider selling shares in their facilities to HDSa companies, make capacity available, and to include these companies as joint venture partners in expansions and upgrades.

Financing

The Liquid Fuels Charter acknowledges that finance is a serious constraint for HDSa companies. In order to address this issue, the Charter encourages companies to consider strategic partnerships and to implement external financing mechanisms, giving HDSa companies access to equity ownership. Industry participants are also to acknowledge the importance of credit and to take this into account in bilateral activities. Simultaneously, government is to explain necessary financial milestones to the industry.

Licence and regulatory

The Liquid Fuels Charter provides that Regulatory frameworks and agreements must facilitate the objectives set out in the Charter. Synfuels Supply Agreements must strive in the fairest way possible to accommodate HDSa companies, which lack the facilities to comply fully with such agreements.

The DME, in order to achieve the objectives set out in the Liquid Fuels Charter, conduct an annual survey of the industry, evaluating the progress in achieving the White Paper objectives using the data submitted by companies each year.

Conclusion

Companies and parties involved in the petroleum and liquid fuels industry are obligated in terms of the Charter to foster a supportive culture and to incorporate and drive a process of transformation and change in accordance with the obligations placed on them in the Constitution, BEE principles and meaningful responsibility within a democratic South Africa.
The Maritime Transport Industry is governed by the National Ports Act, which has as one of its objectives, the contribution to the economic growth and development of South Africa. While the National Ports Act is primarily aimed at the transparent and efficient running of ports, this must be carried out in the context of government policies.

Ownership, control and management and equity
The Charter provides that the local maritime industry must increase black ownership across the spectrum of the value chain. The Capital and Services sectors commit to seek opportunities to broaden the ownership base of their companies and ensure that at least 25% of equity is held by black people, with at least 10% earmarked for women and 5% for people living with disabilities, within the next five years. These sub-targets are a proportion of the total BEE target for each indicator.

Private industry is to recruit onto their executive boards and similar governing structures black directors to reach a target of at least 40% within five years. 40% of this target, which is equal to 16% of the total, should be earmarked for black women and 5% for all people living with disabilities on executive boards and similar governing structures. This industry has further committed itself to proactively seeking opportunities to enter joint ventures and other alliances and to directly invest in BEE companies. Government on the other hand has the responsibility to recruit onto their executive boards and governing structures black people to reach a target of at least 60% within five years. 40% of this target, which is equal to 24% of the total, should be earmarked for black women and 5% for all people living with disabilities. Government has committed itself to investigating opportunities to enter into creative joint ventures with BEE companies.

Skills development and job creation
All stakeholders commit to invest at least 1% of their payrolls in skills development initiatives, inclusive of all associated costs and the current 1% skills development levy. Private industries are required to identify a talent pool of black people for accelerated development. Government commits in this Charter to design and fund a coordinated framework and programme for career awareness and training that leverages off and adds value to existing initiatives. Finally, the Transport Education and Training Authority has committed to identifying scarce skills that the industry will require; to decide whether a skill developing institution is required for the industry alone; to introduce new learner- ships; to assist in achieving targets; to collect and publish statistics; assist in unlocking funds from the National Skills Fund; and benchmark training against international best practice.

Procurement
Government has committed in terms of this Charter to ensure that parastatals and public sector organisations develop uniform policies, explore new means, support proudly South African campaigns; implement and invest best-supplier development policies; and procure at least 60% of discretionary spending from BEE suppliers within the next five years.

The private sector has in much the same way committed to identify areas where they can achieve “quick wins” to accelerate BEE; procure at least 30% of discretionary spend from BEE suppliers or operators within the next five years; and to adopt the guidelines on Accounting for Affirmative Procurement that will be set by the Transport Sector BEE Forum. Government on the other hand has the responsibility to seek opportunities to broaden the participation of previously disadvantaged communities in a historic continental initiative.

Conclusion
The signatories to this Charter believe that every company in South Africa must embrace BEE voluntarily, recognising that it is a constitutional, legislative and legal framework as well as an economic imperative to secure a prosperous future for all citizens and therefore a larger market in which to trade. They commit themselves to embark on a major communications and marketing campaign that will take this Charter to every company within the industry to ensure maximum participation by all stakeholders.

All private-sector stakeholders, who commit themselves to this Charter, will agree to have their BEE achievements rated by an independent agency accredited by government. Public-sector organisations will be monitored and rated in a separate process that will be designed by the Department of Transport and the Department of Public Enterprises. However, independent BEE-rating agencies will rate the suppliers of public-sector organisations that do not have such capacity. The independent BEE ratings will go a long way towards eliminating fronting in the industry.

It is therefore important to increase access to skills, capital and economic opportunities and, to raise the economic value and productivity of every employee and enterprise in the industry. This requires all stakeholders to recruit new black people into the industry and to increase employee skills while creating a supportive culture for their talents to thrive. It will also require all stakeholders to facilitate the creation of black entrepreneurs who can participate in economic opportunities throughout the industry value chain.
The two main challenges facing the tourism industry are the need to become more globally competitive and the need to include the formerly disadvantaged into the industry mainstream.

The Charter of Empowerment and Transformation in the Tourism Industry was published for comment in the Government Gazette in January 2005. It is currently with the Minister of Environmental Affairs and Tourism for final review. The intention is that the sector will publish the Charter as a Sector Code in Section 9 of the BEE Act.

The objective of the Charter and its Scorecard is to advance the objectives and set in place implementation frameworks for the BEE Act whilst guiding engagement with stakeholders and setting targets. The key areas of focus in this Charter are ownership, strategic representation, employment equity, skills development and enterprise development, social development and industry specific indicators as set out in the Scorecard.

This Charter applies to all privately owned enterprises within the Tourism Sector, and to all parts of the value chain in the sector, including accommodation, hospitality and related services, travel distribution systems, all organs of State and public entities, organised labour and communities involved with or interested in the Tourism Sector.

The Scorecard is heavily weighted in the first five years for the period ending 31 December 2009, in favour of human factors such as strategic representation, employment equity, skills development and enterprise development. These four factors collectively account for 62% of the Scorecard’s 100% weighting. This aims to broaden and improve the skills capacity in the sector and to ensure that a skilled, trained and efficient workforce will be developed to further facilitate the transformation of the industry.

Ownership, representation and equity

In the first five-year period ending 31 December 2009, ownership is weighted at 15%, in the period from 1 January 2010 to 31 December 2014, it is weighted 20% on the BEE Scorecard. The Sector has committed in terms of this Charter to attaining an overall level of ownership of enterprises by black people of 21% for the period ending 31 December 2009 and 30% for the period ending 31 December 2014. Businesses with a turnover of less than R5 million per annum are exempted from the ownership requirement.

Strategic representation is weighted at 14% for the first five-year period and 12% for the second. Strategic representation is measured at two levels: board representation, referring to membership by black people to the board of directors; and top executive management, referring to participation by black people in the senior non-board level management. On both of these levels the Sector has committed to 30% back people within the first five years and 50% in the second and for black women, 15% in the first five years and 25% in the second.

Employment Equity is weighted at 14% for the first five-year period and 12% for the second. The Sector commits to attaining an overall level of management participation of black people of enterprises of 35% within five years and 50% within 10 years, and for black women, 18% and 25%. For participation at supervisory and junior staff level the Sector has committed to 45% in the first five-year periods and 65% in the second for black people, and 23% and 35% for black women in the two five-year period respectively. With regard to the total staff complement, the Sector commits to 53% in the first five years and 75% in the first 10 years for black people and 38% and 40% respectively for black women.

Skills and enterprise development

Skills development is weighted at 20% in the first five-year period and 18% during the second five years. This significant portion demonstrates the importance of skills development in human capacity building. The Scorecard measures skills development expenditure as a percentage of total payroll. The target set is 3% of payroll inclusive of the 1% Skills Development Levy. 75% of this development expenditure must be spent on the training of black employees. A third indicator measure is provided for that relates to the number of learners hired as part of the workforce where the target is set at 2% of total employees. Finally, with regard to the learnership opportunities provided to black people, the target is set at 80%.

With regard to enterprise development, the weighting is set at 14% during the first five years with its weighting reduced to 10% during the second period. Only benefits flowing to black-owned or empowered small, medium or micro-enterprises qualify in this indicator. A tourism enterprise can elect to contribute through one or more of the indicators, including the percentage of post-tax profits contributed toward any related initiative; total management time contributed to such initiatives; the outcome of initiatives; and the sum of the three indicators.

Procurement

 Preferential procurement is weighted at 15% during the first five-year period and is increased to 18% during the second. The Tourism Scorecard establishes a target of 40% of all procurement by 2009 and 50% by 2014.

Social development

Social development refers to the opportunity to encourage activity that will foster socio-economic growth and development for black people in the Tourism Sector through education, community programmes, health, conservation, etc. This aspect is weighted at 3% for the first five years and at 6% for the second five years. The target set for both periods ending 31 December 2009 and 2014 is 1%.

Industry specific indicators

The two Industry Specific indicators that have been identified by the tourism sector include recruitment of employees with no prior working experience, and the status of the tourism enterprise as a Tourism Marketing South Africa levy collector. Such levies are used to further the interests of black people in all aspects of tourism. These factors are weighted at 5% in the first five years and 4% during the second. A target of 10% has been set for the percentage of new recruits with no prior work experience during the 12 months prior to their prospective employment, within 10 years of the commencement of this Charter.

Conclusion

The Tourism BEE Charter expresses the commitment of all stakeholders in the Tourism Sector to the empowerment and transformation of the sector and its commitment to working collectively to ensure that the opportunities and benefits of the Tourism Sector are extended to black South Africans.

The commitment to empowerment therein is based not only on moral obligations with regard to a transforming South Africa, but also upon our fiduciary obligations to shareholders and employees, and to the growth of the sector within the broader South African economy.

Subsequently the Tourism BEE Charter Council has been appointed by the Minister to not only drive implementation of the Charter, but to also monitor and report back on progress regarding transformation in the industry.
Making BEE meaningful requires an understanding of the context within which it was conceived and the objectives it has to achieve. The achievement of equality is without doubt a foundational norm and indispensable element of our constitutional order. Section 1(a) of the Constitution provides that South Africa is one, sovereign, democratic state founded on, inter alia, the following values: “Human dignity, the achievement of equality and the advancement of human rights and freedoms.”

Achievement of equality

The achievement of equality invariably requires a fundamental reconstruction of our society. Section 9 of the Constitution is devised in this context. The equality clause contains a provision which deals with measures which the State should take in order to eliminate unfair discrimination and advance persons who were disadvantaged by unfair discrimination. There is nothing in the equality clause to suggest that these measures should be taken exclusively by the State; private individuals too must take these measures. BEE is one of these measures which the Constitution expressly mandates for the progressive realisation of equality. Confirming that BEE is aimed at achieving equality, the preamble to the Act provides, inter alia, that it was enacted in order to –

promote the achievement of the constitutional right to equality,

increase broad-based and effective participation of black people in the economy and promote a higher growth rate, increased employment and more equitable distribution.

A value-driven BEE project

The Constitution and the BEE Act provide a framework for the values that should underpin BEE if it will have any meaning. With the ongoing debate about whether or not BEE is increasing the effective participation of black people in the mainstream economy and the focus on the issue of fronting, it is arguable that the lack of appreciation and understanding of the importance of the constitutional values is exactly what is missing in the implementation of BEE. Delivering the Bam Fischer memorial lecture in 2000, the former Chief Justice of South Africa, Arthur Chaskalson said: “Too many of us are concerned about what we can get from the new society, too few with what is needed for the realisation of the goals of the Constitution. What is lacking is the energy, the commitment and the sense of community that was harnessed in the struggle for freedom.”

The broad policy objectives of the BEE Act are to create a framework for genuine participation of black people in the economy and to facilitate economic growth, social development and enterprise development. The BEE Act envisages that BEE will not be achieved only through the redistribution of existing wealth, but also through true economic growth and the creation of new enterprises. BEE is defined through three core elements:

- Direct empowerment through ownership and control of enterprises and assets;
- Human resource development (which includes employment equity and skills development); and
- Indirect empowerment through preferential procurement and enterprise development.

It is envisaged that government will adopt various strategies to achieve economic empowerment of all black people.

Although the beneficiaries of BEE are all black people, it is arguable that the primary beneficiaries of BEE initiatives will be the educated and those living in urban areas. It is in this context that the State in the forefront of land reform and redistribution initiative. It is obviously the State that is at the heart of land reform and redistribution. However, private landowners should play their part to facilitate land reform and consequently meaningful BEE.

The Role of the State and Transparency

The State will undoubtedly continue to play a major role in BEE. In terms of section 10 of the BEE Act, organs of State and public entities must ensure the achievement of BEE. These organs of State and public entities must take into account the provisions of the relevant code whenever they determine qualification criteria for the issuing of licences, concessions or other authorisations in terms of any law, and implement a preferential procurement policy, determine qualification criteria for the sale of State-owned enterprises, and develop criteria for entering into partnerships with the private sector. It is in this context that one should also see the process of privatisation and/or restructuring of State assets and procurement of services by organs of State, as an attempt to use the vast amounts of wealth which the State administers for the benefit of all South Africans. In the process of privatisation and/or restructuring of State assets and the procurement of services, the State and the primary beneficiaries must be mindful of the values enshrined in the Constitution.

In creating economic opportunities for black people, the State should be transparent and fair. This ensures that BEE is not shrouded in secrecy (which nurtures corruption) but is open to public scrutiny. The Constitution requires that public resources be distributed in a fair and transparent manner. Our politicians and public officials should act honestly and in good faith. This is how the State can maintain public trust and confidence in the implementation of BEE. Professor Hugh Corder reminds us that when the administrative process is not transparent and accountable –

“Administrative law declines in scope and importance, it becomes a ‘disgrace’, public administrators become corrupt, with any sense of ‘service’ owed cravenly to their masters alone.”

Conclusion

Therefore, in order to make BEE meaningful it is crucial that we regain the sense of community and not lose sight of the vision that the Constitution seeks to achieve a society based on democratic values, social justice and fundamental human rights. A meaningful implementation of BEE requires the process to be underlined by responsibility, equity, inclusivity, security, proportionality, accountability and flexibility.
# Glossary of Defined Terms

**A**
- **ABET** – Adult Basic Education and Training
- **Adjusted Recognition for Gender** – in determining whether a particular compliance target is met, the use of Adjusted Recognition for Gender means that participation by black women will count double the participation by black men, up to a maximum of 50 percent of the compliance target. Thus there is no set target for participation by black women, however, an entity with more participation by black women will score higher than an entity with less participation.

**B**
- **B-BBEE** – broad-based black economic empowerment, in this document used interchangeably with the term BEE
- **BEE** – black economic empowerment
- **BEE Act** – the Broad-Based Black Economic Empowerment Act No. 53 of 2003
- **Broadcasting Act** – the Broadcasting Act No. 4 of 1999

**C**
- **Codes** – means the Codes of Good Practice published in Government Notice 112 in Government Gazette 29617 dated 9 February 2007 in terms of the BEE Act
- **Companies Act** – the Companies Act No. 61 of 1973
- **Competition Act** – the Competition Act No. 89 of 1998
- **Constitution** – the Constitution of the Republic of South Africa, 1996

**D**
- **Direct ownership** – ownership of an equity interest, together with control over all of the voting rights attached to that equity interest.
- **DME** – Department of Minerals and Energy
- **DTI** – Department of Trade and Industry

**E**
- **Economic Interest** – a claim against an entity representing a return on ownership of the entity similar in nature to a dividend right, measured using the Flow-Through and, where appropriate, the Modified Flow-Through Principles
- **Electronic Communications Act** – Electronic Communications Act No. 36 of 2005
- **Employment Equity Act** – the Employment Equity Act No. 55 of 1998
- **Enterprise Development** – contributions made in favour of beneficiary entities by a measured entity with the objective of assisting or accelerating the development, sustainability and ultimate financial and operational independence of that beneficiary.
- **Exempted Micro-Enterprise** – any enterprise with an annual total revenue of R5 million or less
- **Enterprise** – a voting right attaching to an equity instrument owned by or held for a participant measured using the Flow-Through Principle or Control Principle

**F**
- **FSC** – the Financial Services Charter

**H**
- **HDI** – Historically Disadvantaged Individuals
- **HDSA** – historically disadvantaged South African

**I**
- **IBA Act** – the Independent Broadcasting Authority Act No. 153 of 1993
- **ICASA** – the Independent Communications Authority of South Africa
- **Indirect ownership** – an economic interest only, excluding the requirement for direct participation in voting rights.
- **ITA** – Income Tax Act No. 58 of 1962
- **JV** – joint venture

**J**
- **Mandated Investment** – any investment made by or through a third party regulated by legislation on behalf of the actual owner of the funds, pursuant to a mandate given by the owner to the third party which mandate is governed by the relevant legislation. This includes investments made by or for collective investment schemes, insurance funds, pension funds, medical schemes etc
- **Mining Charter** – the Broad-Based Socio-Economic Empowerment Charter for the Mining Industry

**K**
- **QSE** – Qualifying Small Enterprise, which is currently defined as any enterprise with an annual total revenue of between R5 million and R35 million

**L**
- **NEPAD** – the New Partnership for Africa’s Development
- **National Ports Act** – National Ports Act No. 12 of 2005

**M**
- **PPF** – public private partnership
- **PPP** – Public Private Partnership

**N**
- **PDI** – Previously Disadvantaged Individuals
- **Preference Procurement Policy Framework Act** – the Preference Procurement Policy Framework Act No. 5 of 2000
- **Petroleum Products Act** – Petroleum Products Act No. 120 of 1977

**O**
- **QSE** – Qualifying Small Enterprise

**P**
- **PDI** – Previously Disadvantaged Individuals
- **Preferential Procurement Policy** – the Preferential Procurement Policy Framework Act No. 5 of 2000

**Q**
- **QSE** – Qualifying Small Enterprise

**R**
- **Revenue** – the total income of an entity from its operations as determined under South African Generally Accepted Accounting Practice

**S**
- **SANAS** – South African National Accreditation System
- **Scorecard** – the Scorecard for measuring Black Economic Empowerment set out in Code 000 of the Codes
- **SETA** – Sector Education Training Authorities
- **Skills Development Act** – the Skills Development Act No. 97 of 1998
- **Skills Development Levies Act** – the Skills Development Levies Act No. 9 of 1999
- **SMes** – small or medium enterprises
- **SPV** – special purpose vehicle
- **Standard Valuation Method** – a standard valuation method for an instrument or right measured under Code 100, undertaken using normal valuation methods that represent standard market practice

**T**
- **Telecommunications Act** – the Telecommunications Act No. 103 of 1996
- **Total Revenue** – the total income of an entity from its operations as determined under South African Generally Accepted Accounting Practice