



Live free. Prosper.

South African Institute of Race Relations NPC
Submission to the
Department of Trade, Industry and Competition
regarding
PROPOSED AMENDMENTS TO THE BROAD-BASED BLACK ECONOMIC EMPOWERMENT
CODES OF GOOD PRACTICE
29 March 2026

<u>TABLE OF CONTENTS</u>		<u>PAGE</u>
1	INTRODUCTION	2
2	INADEQUATE PUBLIC PARTICIPATION	2
2.1	No socio-economic impact report	3
2.2	Poor compliance with the National Policy Development Framework	3
2.3	A “tick-box” approach already evident	4
3	THE CONTENT OF THE DRAFT BEE CODES	4
3.1	Draft Statement 000 of 2026: General Principles and the Generic Scorecard	5
3.2	Schedule 1 – Definitions	6
3.3	Statement 400: The general principles for measuring enterprise and supplier development	6
3.4	Statement 600: Codes of Good Practice for Qualifying Small Enterprises (QSE’s)	11
3.5	Statement 103: The Recognition of Equity Equivalentents for Multinationals	12
4	RAMIFICATIONS OF THE PROPOSED CHANGES	12
4.1	Will contributions to the Transformation Fund be compulsory?	12
4.2	Major changes to preferential procurement obligations	13
4.3	Access to finance is not the main constraint	15
4.4	Other financing agencies have unused funds available	15
4.5	The private sector is more effective at incubating black businesses	16
4.6	No clarity on the governance of the Fund	18
4.7	Increased reporting requirements for business	18
4.8	Increased risks of corruption and abuse	19
4.9	Adding to the burden and the costs of BEE	21

5	THE UNCONSTITUTIONALITY OF THE DRAFT BEE CODES	22
5.1	Section 217 of the Constitution	22
5.2	Section 1(c) of the Constitution	23
5.3	Section 9 of the Constitution	23
5.4	Section 213 of the Constitution	24
6	THE WAY FORWARD	24
6.1	EED’s race-neutral approach	24
6.2	EED’s appropriate scorecard	24
6.3	EED’s tax-funded vouchers for the disadvantaged	26

1 INTRODUCTION

On 29 January 2026 the Minister of Trade, Industry and Competition, Mr Parks Tau (“Mr Tau”), invited interested persons to submit public comments within 60 days to the Broad-Based Black Economic Empowerment Policy Unit (“the B-BBEE Policy Unit”) in the Department of Trade, Industry and Competition (“the dtic”) regarding Proposed Amendments to the Broad-Based Black Economic Empowerment Codes of Good Practice (“the draft BEE Codes”) adopted under the Broad-Based Black Economic Empowerment Act of 2003 (“the BEE Act”).

This submission on the draft BEE codes is made by the South African Institute of Race Relations NPC (“IRR”), a non-profit organisation formed in 1929 to oppose racial discrimination and promote racial goodwill. Its current objects are to promote democracy, human rights, development, and reconciliation between the people of South Africa.

2 INADEQUATE PUBLIC PARTICIPATION

Public participation in the legislative process is a vital aspect of South Africa’s democracy, as the Constitutional Court has repeatedly reaffirmed in judgments spanning well over a decade. These include *Matatiele Municipality and others v President of the Republic of South Africa and others*, *Doctors for Life International v Speaker of the National Assembly and others*, *Land Access Movement of South Africa and others v Chairperson of the National Council of Provinces and others*, and *Mogale and others v Speaker of the National Assembly and others*.¹

In the *New Clicks* case in the Constitutional Court, Mr Justice Albie Sachs noted that there were many ways in which public participation could be facilitated. He added: “What matters is that...a reasonable opportunity is offered to members of the public and all interested parties to “*know about the issues and to have an adequate say*”. This passage was quoted with approval in *Doctors for Life*, the *Land Access* case, and in the *Mogale* judgment striking down the Traditional and Khoi-San Leadership Act of 2019.²

¹ [2006] ZACC 12; 2007 (1) BCLR 47 (CC); 2006 (6) SA 416 (CC); 2016] ZACC 22; [2023] ZACC 14.

² Section 59(1), Constitution of the Republic of South Africa, 1996; *Minister for Health and another v New Clicks South Africa (Pty) Ltd and others*, [2005] ZACC 14, at para. 630, emphasis supplied by the IRR; *Doctors for Life*, at para. 145; *Land Access* judgment, at para. 59; *Mogale* judgment, at para. 34.

2.1 No socio-economic impact report

To help the public “know about the issues”, as the *New Clicks* ruling and other judgments require, the B-BEE Policy Unit should have provided a comprehensive evaluation of the draft BEE Codes and their likely socio-economic impact. A report of this kind is also what is needed under the government’s own *Guidelines for the Socio-Economic Impact Assessment System (SEIAS)*.

The *Guidelines* were developed by the Department of Planning, Monitoring and Evaluation in May 2015 and took effect in September that year. The aim of the SEIA system is to ensure that “the full costs of regulations and especially the impact on the economy” are fully understood before new rules are introduced.³ According to the *Guidelines*, the SEIA system must be applied at various stages in the policy process. Once new rules have been proposed, “an initial assessment” must be conducted to identify different “options for addressing the problem” and making “a rough evaluation” of their respective costs and benefits. Thereafter, “appropriate consultation” is needed, along with “a continual review of the impact assessment as the proposals evolve.”⁴

A “final impact assessment” must then be developed that “provides a detailed evaluation of the likely effects of the [proposed law] in terms of implementation and compliance costs as well as the anticipated outcome.” When new rules are published “for public comment and consultation with stakeholders,” this final assessment must be attached to them. A particularly important need is to “identify when the burdens of change loom so large that they could lead to excessive costs to society, for instance through disinvestment by business or a loss of skills to emigration.”⁵ The draft BEE codes pose risks of precisely this kind. Yet no proper SEIA assessment has been made available to help the public develop an informed understanding of the likely ramifications of the proposed changes.

2.2 Poor compliance with the National Policy Development Framework

The B-BEE Policy Unit is also expected to comply with the *National Policy Development Framework* (“the *Framework*”), which was approved by the Cabinet in December 2020 and is intended to help give effect to the *National Development Plan: Vision 2030*.

The *Framework* seeks to improve policy development by “ensuring meaningful participation” and “inculcating a culture of evidence-based policy making.”⁶ In a section dedicated to “Stakeholder Engagement in Policy Making,” the *Framework* states: “Chapter 10 of the Constitution prescribes that people’s needs must be responded to, and the public must be encouraged to participate in policy making. Therefore, the involvement of the public in policy making is a constitutional obligation that government institutions must respect and institutionalise.”⁷

³ Department of Planning, Monitoring and Evaluation, “Socio-Economic Impact Assessment System (SEIAS), Revised Impact Assessment: National Health Insurance Bill,” 26 June 2019 (2019 SEIAS Assessment); *SEIAS Guidelines*, p. 3, May 2015.

⁴ *SEIAS Guidelines* p. 7.

⁵ *SEIAS Guidelines*, p. 11.

⁶ National Policy Development Framework, 2020, p. 3.

⁷ *Ibid*, p. 19.

The *Framework* goes on to list some of the key requirements for proper public participation. “Consultation with stakeholders should commence as early as possible,” it says. All relevant stakeholders should be identified, including “those who will benefit when problems are addressed” and “those who will bear the cost of implementation of the proposed intervention.” Policy makers must also identify and counter all “barriers to active participation” and ensure that “consultation is infused in all aspects of the policy making cycle.”⁸

According to the *Framework*, adequate thought must be given to “which policy solutions would best achieve the public policy objective” and “how best” the proposed policy solution can be implemented. Policy makers must “inform and engage stakeholders” on “the nature and magnitude of a policy issue,” along with its likely “impacts and risks.” These assessments must be “informed by the best available evidence, data, and knowledge.”⁹

In addition, policy makers must be willing to adjust their proposals in the light of the feedback provided. “Policy makers must not impose their preconceived ideas...and pre-empt the outcome of the policy consultation process. They need to be willing to be persuaded and acknowledge the input of stakeholders with a view to creating a win-win policy outcome.” They must also avoid any impression that “the consultation process is staged, managed, cosmetic, token, and a mere compliance issue.” Instead, they must “strive to produce an outcome based on bargaining, negotiation, and compromise.”¹⁰

The *Framework*, with its emphasis on negotiation and compromise in the best interests of the country, is also being ignored. Instead, what the *Framework* expressly rejects – a “tick-box” approach to consultation – is evident as regards the draft BEE Codes.

2.3 A “tick-box” approach already evident

Though the draft BEE Codes are likely to have many negative consequences (as further described in this submission), the B-BBEE Policy Unit has nevertheless adopted a “tick-box” approach to public consultation. This has denied South Africans the comprehensive information they require to “know about” the relevant issues and then have “an adequate say” on the proposed changes.

Moreover, Mr Tau has provided a scant 60 days for public comment on the draft BEE Codes. Yet the changes being proposed are complicated and go well beyond the introduction of a proposed Transformation Fund. Hence, they cannot easily be understood in the short time allowed: and especially so in the absence of a comprehensive SEIA report. In these circumstances, the deadline set is an unrealistic one, which seems calculated to inhibit – rather than promote – the public participation in policy development which the Constitution requires.

3. THE CONTENT OF THE DRAFT BEE CODES

The proposed changes to the Draft BEE Codes are contained in various documents, all of which must be taken into account. In the analysis of the new wording which follows, words or numbers

⁸ Ibid, pp. 19 – 20.

⁹ Ibid, p. 20.

¹⁰ Ibid.

which have been omitted are marked in **bold** square brackets, the proposed wording of new rules is underlined and the IRR's comments on the proposed changes are *italicised*.

3.1 Draft Statement 000 of 2026: General Principles and the Generic Scorecard

3.1.1 Enterprise Development, and Supplier Development and Transformation Fund

According to Point 3.3.1.3.1 in Draft Statement 000, “the sub-minimum required for Enterprise and Supplier Development is 40% of the total weighting points for each of the four categories, excluding bonus points, within the Enterprise Development, **[and]** Supplier Development and Transformation Fund element, namely, preferential procurement (40% of the **[25]** 27 points); Supplier Development (40% of the 10 points); Enterprise Development (40% of the 5 points); and Transformation Fund (40% of the 20 points).”

***Comment:** This wording indicates that all Large Enterprises with annual turnover exceeding R50 million – other than those with sufficient black ownership for “enhanced recognition” – will be required to obtain sub-minimum points on all **four** components, including the Transformation Fund (“the Fund”). Most recent comments on the Fund, however, have suggested that making contributions to it will be voluntary – and that Large Enterprises will be able to choose to continue with their existing contributions to Supplier and Enterprise Development instead. These expectations are at odds with the wording of the Draft Statement. This makes for confusion and suggests that the public may have been misled as to the full burden the Draft BEE Codes will in fact have.*

3.1.2 Qualifying Small Enterprises and Priority Elements

Under Point 3.3.2.2, “qualifying small enterprises” – generally, those with annual turnover between R10 million and R50 million – will be “required to comply with Ownership as a compulsory element, and either Skills Development or Enterprise, (sic) Development, **[and]** Supplier Development and Transformation Fund.” (As in the past, QSEs with sufficient black ownership will be exempted.)

***Comment:** Again, the new wording is confusing. Under the current BEE codes, “enterprise and supplier development” counts for 40 points in total and has three components: preferential procurement, supplier development and enterprise development. Hence, QSEs which choose this element as their second priority element must obtain 40% sub-minimum scores on each of these three components.*

Under this draft Statement, it is uncertain whether QSEs which choose “enterprise and supplier development” as their second priority element will still need to obtain a sub-minimum for preferential procurement, as this is not mentioned under this Point. In addition, the wording used indicates that a sub-minimum score on the Fund will be required. Again, this is at odds with widespread perceptions that contributions to this Fund will be voluntary. This makes for yet further uncertainty. Again, it suggests that the public has been misled regarding the additional compliance burden in fact being introduced.

3.1.3 Changes to the BEE Generic Scorecard

Under Point 9.1, setting out the proposed changes to the generic scorecard, “Enterprise and Supplier Development” will have a weighting of “**[40]** 62 points (the maximum points an entity

can score is 47) (Plus [4] 6 bonus points).” In addition, the “Total” for all elements is “[109] 131” or (presumably via the addition of bonus points) “[118] 142 Points”.

Comment: *Again, the wording used is confusing. First, there is no reference here to the Transformation Fund. Second, there is no explanation as to why the maximum points a measured entity may score total 47, when 62 points are supposed to be available for this element of BEE. In addition, the total number of points available, at a revised total of 131, clearly envisages that 67 points may be earned for this element, rather than the stated maximum of 47. Confusion of this kind makes the proposed provision unintelligible.*

3.2 Schedule 1 – Definitions

A definition of “Transformation Fund” is to be added to the definitions already contained in this Schedule to the BEE Act. The wording proposed is as follows:

“Transformation Fund’ means an aggregated mechanism to accelerate economic transformation and support Black enterprises, especially EMEs and QSEs. It aims to pool resources from measured entities to create a scalable impact rather than fragmented individual ESD initiatives.”

Comment: *“EMEs” are Exempt Micro Enterprises with annual turnover below R10 million, while QSEs are Qualifying Small Enterprises, as earlier described. “ESD” refers to the “enterprise and supplier development” element in the existing codes.*

The wording used here suggests that pooling contributions in a single fund will achieve a “scalable impact”, which “fragmented” contributions to ESD cannot. This is a questionable assumption, as the disadvantages of concentrating empowerment funds in the hands of a government which has often proved inefficient and corrupt are likely to be considerable. The assumed benefits of “pooling” are thus unlikely to be achieved. The true costs of the proposed change should therefore have been set out in full in an accompanying SEIA report, so as to help the public understand their ramifications.

3.3 Statement 400: The general principles for measuring enterprise and supplier development

3.3.1 Amended objectives

Under this amended Statement, “the objectives of this statement” are amended as follows:

One objective, as set out in Point 1.2, is to “Specify the key measurement principles applicable to calculating Preferential Procurement contributions; Qualifying Enterprise, [and] Supplier Development and Transformation Fund Contributions.”

Another objective, as stated under Point 1.3, is to “Define the principles applicable when calculating B-BBEE Procurement Spend [and] Enterprise Development, [and] Supplier Development Spend and Transformation Fund.”

Comment: *The drafting is sloppy here, for the different terms used at different times imply, for example, that “Preferential Procurement contributions” may be different from “B-BEE Procurement Spend.” That the wording is ungrammatical also makes for confusion.*

3.3.2 Enterprise and Supplier Development Scorecard

3.3.2.1 Preferential procurement

Various changes are made to the Table under Point 2.1, which deals with Preferential Procurement. The existing BEE Codes indicate that measured entities must buy all the goods and services they need each year from “empowering suppliers,” as defined in the codes. Under the existing rules – and also under this amended Statement – such entities earn 5 points for procuring 80% of their annual purchases from such suppliers (see Point 2.1.1).

Under the amended Statement, measured entities – if they wish to qualify for additional points – will not only have to procure from “empowering suppliers” but will also have to obtain:

- 15% of their annual purchases from QSEs, for which 1 point (down from [3]) can be earned (see Point 2.1.2);
- 15% of their annual purchases from “100% Black-Owned QSEs”, for which 2 points can be earned (see Point 2.1.3);
- 15% of their annual purchases from EMEs, for which 2 points (down from [4]) may be earned (see Point 2.1.4, no longer [2.1.3]);
- 15% of their annual purchases from EMEs “that are 100% Black-Owned”, for which 2 points may be earned (see Point 2.1.5);
- 25% (down from [50%]) of their annual purchases from empowering suppliers that are between 51% and 99% Black-Owned, for which 3 points (down from [11]) may be earned (see Point 2.1.6, no longer [2.1.4]);
- 25% of their annual spend from empowering suppliers that are “at least (sic) 100% Black-Owned,” for which 7 points may be earned (see Point 2.1.7);
- 12% of their annual spend from empowering suppliers that are “at least 30% Black-Women Owned”, for which 2 points [down from [4]) may be earned (under Point 2.1.8, no longer [2.1.5]);
- 12% of their annual spend from empowering suppliers “that are 100% Black-Women Owned,” for which 3 points may be earned, under Point 2.1.9; and
- 10%, up from [2%], of their annual spend from empowering [designated group] suppliers that are [at least 51%] “100% Black-owned by Designated Groups,” under Point 2.1.10, no longer [2.1.9].

Comment: According to Schedule 1, Definitions, as set out in the existing BEE Codes, a “Designated Group Supplier” means a supplier that is “at least 51% owned by one or more of the following categories”: (a) “unemployed black people,” not attending an educational institution or awaiting admission to one; (b) “Black people who are youth” under the National Youth Commission Act of 1996; or (c) “Black people...with disabilities,” as defined in the relevant Code of Good Practice issued under the Employment Equity Act of 1998. The definition of Designated Groups remains the same. However, the target for procurement from such groups is raised from 2% to 10%. In addition, measured entities will have to ensure that the Designated Group suppliers from which they buy are 100% Black-owned, rather than 51% Black-owned. This criterion might be difficult in practice to fulfil.

The overall compliance burden arising from these proposed provisions, as well as their likely costs, are more fully described in the Ramifications section of this submission.

3.3.2.2 Supplier Development

The amended Statement specifies, in Point 2.2.1, that measured entities may earn 10 points for “the annual value” of their supplier development contributions, “as a percentage of the target, informed by a needs analysis.” The target is 2% of net profit after tax (“NPAT”).

3.3.2.3 Enterprise Development

The amended Statement specifies, in Point 2.3.1, that measured entities may earn 5 points for “the annual value” of their enterprise development contributions and sector specific programmes, “as a percentage of the target, informed by a needs analysis.” The target is 1% of net profit after tax (NPAT).

3.3.2.4 Transformation Fund

Under a new Point 2.4, the amended Statement provide an alternative (the word used is “OR”) to current supplier and enterprise development contributions. Under Point 2.4.1, measured enterprises may, alternatively, earn 20 points for “Annual Value of Supplier and Enterprise Development Contribution to the Transformation Fund informed by a needs analysis”. The target here is 3% of NPAT.

Comment: *There is no reference here to the annual value of contributions “as a percentage of the target,” as under Points 2.2 and 2.3. This makes for considerable ambiguity as to what is meant. One possible interpretation is that, while 20 points may be earned for contributing 3% of NPAT to the Transformation Fund, no points at all will be available for lesser contributions. Uncertainty of this kind is contrary to the rule of law and thus in conflict with the founding values of the Constitution.*

3.3.2.5 Bonus Points

Under a new Point 2.5, the amended Statement lays down various new rules regarding the bonus points that may be earned in this sphere.

Under Point 2.5.1, a measured entity may earn 2 bonus points (up from **[1]**) for “a recipient of ESD contributions and/or a 100% Black-Owned QSE or EME and first-time supplier that has a minimum 3-year contract with the Measured Entity.”

Under the same Point, 2 bonus points (up from **[1]**) are available in the event of “average turnover and job creation growth of 10% per annum for period of three-year contract (sic) of all on boarded first time suppliers.”

Comment: *The wording of Point 2.5.1 is ungrammatical and difficult to understand. It also seems to assume, for example, that annual turnover and employment will be able to grow at 10% per annum for many first-time suppliers with three-year contracts. However, in South Africa’s stagnant economy – which is further bedevilled by logistical failures, water shedding, dysfunctional state entities and persistent corruption and wastage – this is unlikely to occur. It also seems that anything short of 10% annual growth will not count for any BEE points at all.*

3.3.3 Key measurement principles

Here, Point 3.1 of the amended Statement begins by saying that “The Enterprise and Supplier Development (sic) consist (sic) of:” *This is ungrammatical and difficult to follow.*

Point 3.1 goes on to list the four components of this element, each of which is separately numbered, as

3.1.1 Preferential Procurement

3.1.2 Enterprise Development **[and]**

3.1.3 Supplier Development or

3.1.4 Transformation Fund.

According to Point 3.2, “Enterprise development **[and]** Supplier Development or Transformation Fund contributions will be recognised as a percentage of net profit after tax.”

According to Point 3.2.2, “a measured entity has a choice of compliance with the 3% NPAT through implementation of both Enterprise Development... and Supplier Development... indicators; or by only contribution (sic) to the Transformation Fund using NPAT.”

Essentially the same wording is included in Point 3.2.3, which says “a measured entity has a choice of compliance with either Enterprise Development and Supplier Development, or Transformation Fund.”

Comment: *The wording used in both these points is inconsistent with the wording used under Point 3.1 above – and also with the four separate components that Point 3.2 expressly identifies and numbers separately. In addition, the wording used under this point indicates that QSEs which opt for this element as their second priority element need not comply with preferential procurement at all. However, it seems unlikely that this is what the dtic in fact envisages. Overall, the wording used makes for even greater confusion.*

3.3.4 Sub-minimum and discounting principle

Under Point 3.3 of the amended Statement, “a measured entity must achieve a minimum of 40% of each of the total weighting points, as set out under 2.1, 2.2, 2.3 or 2.4 of the Scorecard.”

Comment: *Again, this indicates that the 40% sub-minimum applies to **each** component: ie preferential procurement, supplier development, enterprise development and also the Fund. The use of the word “or” does not resolve this confusion. If anything, it adds to it by suggesting, for example, that there might perhaps be a choice between preferential procurement (under point 2.1) and making contributions to the Fund (under point 2.4).*

3.3.5 Needs analysis, performance metric and Monitoring and Evaluation report

Under Point 4.5 of the amended Statement, “measured entities who selects (sic) to comply with Enterprise Development and Supplier Development as well as those partnering with the Transformation Fund are required to submit a needs analysis, performance metric (with outputs and outcomes such as turnover growth, job growth, increased access to local and international markets, increase in profitability, greater innovation), and an annual Monitoring and Evaluation”

report (to B-BBEE authorities, inclusive of the Verification Agency) to verify their contributions and impact to the beneficiaries to ensure compliance with the ESD objectives.”

Comment: *This obligation will add significantly to the burden of BEE compliance, without securing any of the mooted benefits (“job growth” and “greater innovation,” for example) envisaged.*

There is no indication of what a “needs analysis” is supposed to cover. What needs are in issue? Those of existing BEE firms, of the unemployed, or of consumers, for example? At what level are these needs to be assessed: at the level of the measured entity, within a particular sector, or within the economy as a whole? How much information is to be gathered for this purpose? How is it to be obtained? How is it to be verified? All these issues remain unresolved, making for great uncertainty.

In addition, there is little likelihood that the amended Statement (or any of the other proposed changes in the Draft BEE Codes) will bring any of the economic benefits outlined in this provision. This further illustrates why an objective and comprehensive SEIA report should have been made available to help identify the increased compliance burden – and examine the likelihood that any the promised benefits will be achieved.

Moreover, where measured entities opt to make their ESD payments to the Fund – which will aggregate their payments with everybody else’s – there will be no way for them to assess the “impact to the beneficiaries” of the payments they have made. How then can they demonstrate that they have “ensured compliance with the ESD objectives”?

This broad wording conflicts with the doctrine against vagueness of laws. The officials to be charged with responsibility for assessing “compliance with the ESD objectives,” for example, are sure to interpret this wording in different ways at different times. Uncertainty of this kind is contrary to the rule of law and inconsistent with the Constitution.

3.3.6 Measurement of Enterprise Development, Supplier Development or Transformation Fund contributions

Under Point 11.1 of the amended Statement, “A measured Entity (sic) receives a score for Enterprise Development, **[and]** Supplier Development OR Transformation Fund in proportion to the extent that it meets the compliance target.

Comment: *The use of the word “OR” here indicates that measured entities are indeed to have a choice between continuing with their current ESD contributions and contributing to the Fund instead. If this is indeed the intention, it is at odds with other wording in the Draft BEE Codes, as earlier outlined.*

3.3.7 The “Benefit Factor Matrix” in Annexe 400(B)

Comment: *The detailed changes to the “Benefit Factor Matrix” contained in Annexe (sic) 400(B) cannot be addressed in the limited time made available for public comment on this Code.*

3.4 Statement 600: Codes of Good Practice for Qualifying Small Enterprises (QSE's) (sic)

3.4.1 The Qualifying Small Enterprise Scorecard

Under Point 3.2 of this amended Statement, the QSE Scorecard is to be amended so as to give the BEE element of “Enterprise **[and]** Development, Supplier Development and Transformation Fund” a “weighting” of “55 points,” up from **[30]**.

***Comment:** Again, the use of the word “and” rather than “or” makes for confusion as to whether QSEs will be expected to comply with all three of the components listed here. If so, then contributions to the Fund are to be made mandatory and measured entities will have no choice as to whether to maintain their existing SED contributions or swop to the Fund instead.*

3.4.2 Preferential procurement

Point 7.1.1.1 of this amended Statement begins by reaffirming (as under the existing BEE rules) that QSEs are expected to buy 60% of the goods and services they need each year from “qualifying suppliers,” for which they may earn up to 15 points.

Thereafter, however, some major changes are proposed. If QSEs want to qualify for additional points they will make sure that they buy from empowering suppliers with a particular racial and gender make-up. Under the proposed changes, they will have to obtain:

- 15% of their annual purchases from empowering suppliers that “are at **[least]** 61% (sic) and 99% black owned” (sic), for which they may earn up to 5 points;
- 15% of their annual purchases from “Exempted Micro Enterprises that are 100% Black Owned,” for which they may earn up to “4” points;
- 20% of their annual purchasers from “empowering suppliers that are at least (sic) 100% Black-Women owned,” for which they may earn up to “6” points.

Under Point 7.1.1.2 of this amended Statement, dealing with Bonus Points, QSEs may also be able to earn:

- 1 bonus point for obtaining 5% of their annual purchases from “[Designated Group] suppliers that are **[at least 51%]** 100% Black owned by Designated Groups”;
- 5 bonus points for contributing 1% of NPAT to Supplier Development, and another 5 bonus points for contributing 1% of NPAT to Enterprise Development, as in the existing rules; OR
- “15” bonus points for contributing “2% of NPAT to the Transformation Fund informed by a needs analysis;”
- “2” bonus points (up from **[1]**) if “a recipient of ESD contributions and/or a 100% black owned QSE or EME and first time supplier...has a minimum 3-year contract with the measured entity;” or
- “2” bonus points (up from **[1]**) for “average turnover and job creation growth of at least 10% per annum for period of three-year contract (sic) of all on boarded first time suppliers.”

Comment: This wording is again ungrammatical and often too confusing to comply with the rule of law. The additional compliance obligations in these provisions, as well as their likely costs, are more fully described in the Ramifications section of this submission.

3.4.3 The “Benefit Factor Matrix” in Annexe 604(A)

Comment: The detailed changes to the “Benefit Factor Matrix” contained in Annexe 604(A) cannot be addressed in the limited time allowed for public comment on this Code.

3.5 Statement 103: The Recognition of Equity Equivalentents for Multinationals

3.5.1 Recognition of Equity Equivalent Programmes

Under Point 3.4. of this amended Statement, “Equity Equivalent programmes may involve projects that support Government strategic economic development policies and programmes such as –

...3.4.5.1 Enterprise Development, **[and]** Supplier Development, and or (sic) Transformation Fund.”

Comment: This wording indicates that multinationals will be expected to contribute either to all, or to any, of these three components of the SED element. This uncertainty is inconsistent with the rule of law and unconstitutional.

4 RAMIFICATIONS OF THE PROPOSED CHANGES

4.1 Will contributions to the Transformation Fund be compulsory?

Many commentators have accepted Mr Tau’s assurance that contributions to the Transformation Fund (“the Fund”) will be voluntary. Most take the view that business will have a choice under the draft BEE Codes: either to continue with their existing Enterprise and Supplier Development (“ESD”) contributions or to swop to the Fund and earn another 5 points for doing so.

Werksman, a major law firm, seems to endorse this view, saying “companies w[ill] effectively need to choose between continuing with their own enterprise and supplier development programmes or contributing to the centralised fund. They w[ill] not be able to do both.”¹¹

However, the wording used, for both large enterprises and QSEs, is different. Take the proposed rules for large enterprises in Point 3.3.1.3.1 in Draft Statement 000, for example. This states, as earlier noted, that “the sub-minimum required for Enterprise and Supplier Development is 40% of the total weighting points for each of the four categories...within the Enterprise Development, **[and]** Supplier Development and Transformation Fund element, namely, preferential procurement (40% of the **[25]** 27 points); Supplier Development (40% of the 10 points);

¹¹ Moonstone Information Refinery, “Transformation Fund Moves into B-BBEE Scorecards as Draft Codes Signal Policy Shift,” 26 February 2026. <https://www.moonstone.co.za/transformation-fund-moves-into-b-bbee-scorecards-as-draft-codes-signal-policy-shift/>.

Enterprise Development (40% of the 5 points); and Transformation Fund (40% of the 20 points).”¹²

This wording indicates that companies will in fact have to meet minimum requirements on all *four* components of this element. As regards the last three, they may have to split their contributions between their current ESD programmes and the new Fund – and make additional contributions to the Fund as well. To meet required sub-minimums, they will also have to ensure they obtain at least 4 points for Supplier Development, at least 2 points for Enterprise Development, and at least 8 points for their contributions to the Fund. (They will also have to obtain 11 points for preferential procurement under rules that will make this more difficult to achieve, as earlier set out and more fully described below.)

Again, this uncertainty needs to be resolved. If the dtic’s intention is that measured entities should have a choice between current ESD contributions and the Fund, then the wording must be amended to reflect this. On the current wording, there will be no such choice.

Moreover, if contributions to the Fund are to be made compulsory, this will effectively turn them into an additional tax. Yet South Africa’s tax base is small and already overburdened. In addition, new taxes cannot be introduced by ministerial regulation. Moreover, all tax revenues have to be paid into the National Revenue Fund, unless this requirement is “reasonably excluded by an Act of Parliament,” as Section 213 of the Constitution requires.¹³ For the draft BEE Codes to seek to introduce a new tax for the benefit of the Fund is thus unconstitutional as well as unwise.

Confusion of this kind is bad for business confidence. So too is the government’s determination to increase the BEE burden via the Draft BEE Codes. The proposed changes will make it even harder to attract the direct investment so urgently required to raise the growth rate, stimulate job creation and expand opportunities for the poor.

4.2 Major changes to preferential procurement obligations

Under the current BEE codes, large enterprises can earn five points for purchasing 80% of the goods and services they need each year from “empowering suppliers”, as (confusingly) defined in these codes. To qualify for the 20 additional points available, they have to obtain:¹⁴

- 15% of their annual purchases from exempt micro enterprises (EMEs), for which four points are available;
- 15% of their annual purchases from qualifying small enterprises (QSEs), for which three points can be earned;
- 40% of their annual purchases from 51% black-owned suppliers, for which nine points can be gained; and
- 12% of their annual purchases from suppliers that are 30% black women-owned, for which four points can be obtained.

¹² Point 3.3.1.3.1, Statement 000 of 2026.

¹³ Section 213(1), Constitution of the Republic of South Africa, 1996 (“the Constitution”).

¹⁴ Jeffery, A, BEE: Helping or Hurting? Tafelberg, Cape Town and Johannesburg, 2014, p. 204.

At present, 12 points out of 25 can be obtained by procuring from empowering suppliers, EMEs and QSEs. This score exceeds the 10 points needed to meet the 40% sub-minimum requirement. For measured entities seeking points in excess of the sub-minimum, nine more points can be obtained by buying from firms that are 51% black owned, while another 4 points can be gained by procuring from firms that are 30% black women-owned.

Under the proposed Statement 400, large enterprises will still be able to earn five points for obtaining 80 of their annual supplies from “empowering suppliers”. However, if they wish to qualify for additional points they will have to obtain:

- a) 15% of their annual purchases from QSEs, for which 1 point (down from **[3]**) can be earned (see Point 2.1.2);
- b) 15% of their annual purchases from “100% Black-Owned QSEs”, for which 2 points can be earned (see Point 2.1.3);
- c) 15% of their annual purchases from EMEs, for which 2 points (down from **[4]**) may be earned (see Point 2.1.4);
- d) 15% of their annual purchases from EMEs “that are 100% Black-Owned”, for which 2 points may be earned (see Point 2.1.5);
- e) 25% (down from **[50%]**) of their annual purchases from empowering suppliers that are between 51% and 99% Black-Owned, for which 3 points may be earned (see Point 2.1.6);
- f) 25% of their annual spend from empowering suppliers that are “at least (sic) 100% Black-Owned,” for which 7 points may be earned (see Point 2.1.7);
- g) 12% of their annual spend from empowering suppliers that are “at least 30% Black-Women Owned”, for which 2 points [down from **[4]**] may be earned (under Point 2.1.8);
or
- h) 12% of their annual spend from empowering suppliers “that are 100% Black-Women Owned,” for which 3 points may be earned (under Point 2.1.9).

Under these proposed changes, a total of 27 points (up from 25 at present) can be obtained for preferential procurement. To meet the 40% sub-minimum required to avoid the discounting of BEE status, 11 points are needed. A maximum of eight points can be obtained by buying the requisite percentages from empowering suppliers, along with EMEs and QSEs. However, at least three more points are needed to meet the specified sub-minimum. The draft BEE Codes thus require significant procurement from empowering suppliers that are 100% black-owned, 100% black women-owned, or between 51% and 99% black-owned.

Such procurement will not be easy to achieve, as poor schooling, anaemic growth, over-regulation and high levels of state inefficiency have long impeded the development of successful black businesses. Hence, as Werkmans comments, “the necessary thresholds may be difficult for companies to meet in practice.” This is important, the firm points out, because

“failing to achieve at least 40% of the relevant scorecard targets would trigger an automatic downgrade of a firm’s B-BBEE rating level.”¹⁵

Bruce Hunt, a director at Transcend Capital (a firm which advises on BEE ownership and other rules), underscores the negative ramifications, saying: “For many companies, this is not an abstract compliance issue. It represents a direct business risk, with revenue and competitiveness at stake.” Moreover, given persistent skills shortages among black South Africans, in particular, it will not be easy to build up supply chains that are in keeping with the new requirements. This may encourage fronting. It may also mean that investing in South Africa will become “harder, not easier, to justify.”¹⁶

4.3 Access to finance is not the main constraint

The dtic’s proposal to introduce the Fund assumes that a shortage of capital is the main constraint preventing the expansion of black business. This is not so. Black businesses face other challenges too which are often more important than the funding one.

Comments Tim Cohen, a senior editor on *Currency News*: “Contrary to the simplistic notion of SA’s government officials, capital is not the problem. The problem is a poor skills base, a lack of viable business ideas and, most of all, anaemic economic growth. Fix those, and the need for yet another transformation fund tax fizzles away.”¹⁷

Hilary Joffe, a senior adviser with the Brunswick Group, agrees, saying: “SA doesn’t have nearly enough entrepreneurial small businesses, especially black-owned ones, and those that are started often don’t survive. But access to finance is not the only reason for that, nor even necessarily the main one. The evidence suggests factors such as government regulations and crime, as well as a dearth of skills and basic municipal infrastructure, weigh just as heavily on small businesses. If Tau wants genuine transformation and entrepreneurship, he could start there.”¹⁸

4.4 Other financing agencies have unused funds available

South Africa has long had a number of agencies seeking to help finance black business, as Dr Stuart Theobald, founder and chair of Krutham, a research-led consultancy, has pointed out. The National Empowerment Fund (NEF), for one, was created in 1998 to help fund and mentor black-owned businesses. Notes Dr Theobald: “The NEF has a loan book of R2.4bn, against

¹⁵ Moonstone Information Refinery, “Transformation Fund Moves into B-BBEE Scorecards as Draft Codes Signal Policy Shift,” 26 February 2026. <https://www.moonstone.co.za/transformation-fund-moves-into-b-bbee-scorecards-as-draft-codes-signal-policy-shift/>.

¹⁶ Hunt, B, “Achilles Heel of the Transformation Fund,” *Business Day*, 27 February 2026. <https://www.businessday.co.za/opinion/2026-02-27-bruce-hunt-achilles-heel-of-the-transformation-fund>.

¹⁷ Cohen, T, “After the Bell: Parks Tau’s terrible transformation fund idea makes a comeback,” *Daily Maverick*, 23 March 2025. <https://www.dailymaverick.co.za/article/2025-03-23-after-the-bell-parks-taus-terrible-transformation-fund-idea-makes-a-comeback>.

¹⁸ Joffe, H, “Tau’s proposed Transformation Fund raises real concerns,” *Business Day*, 24 January 2025. <https://www.businessday.co.za/bd/opinion/columnists/2025-01-24-hilary-joffe-taus-proposed-transformation-fund-raises-real-concerns>.

which it has R810m set aside for impairments. It disbursed about R600m in loans last year, but has R2.2bn cash on its balance sheet, suggesting that its lending activities are not constrained by a lack of cash.”¹⁹

The same is true of three other entities set up to incubate and support small businesses. As Dr Theobald points out: “The[se] other entities all have balance sheets in the billions — Business Partners has a loan book of R2.9bn (provisions are R58.2m); the Small Enterprise Finance Agency (Sefa) has R3.5bn (with an astounding R2.4bn of provisions) while the SA SME Fund has an investment portfolio of about R560m.” All these entities thus “have excess cash.”²⁰

These agencies have also found that non-financial support is the key need – and that it is difficult to provide. The NEF, for example, says Dr Theobald, “hosted 299 training sessions for entrepreneurs” in 2024 alone. That amounts to one such session almost every working day, making for a considerable training burden. Moreover, it is difficult to find enough mentors with the hands-on experience needed for effective training. This is a binding constraint that funding alone cannot address.²¹

4.5 The private sector is more effective at incubating black businesses

Both Ajaj Lalu, MD of Black Lite Consulting, and Business Leadership SA (BLSA) CEO Busisiwe Mavuso agree that “mentoring and non-financial support are the keys to success.” They also point out that the help required must come from people with an in-depth knowledge of market conditions in different sectors. Mentors must also have a good grasp of the skills needed for success in business and the capacity to teach these to new entrants. As IRR Policy Fellow Sara Gon points out: “Small businesses need to know how to quote properly, how to keep a set of books, how to estimate the length of a job as accurately as possible, how to better cost the materials and other expenses required for a job in advance and understand the economics of pricing, etc.”²²

It is absurd to assume that the bureaucrats working for the Fund will be better at teaching these skills than existing entrepreneurs. In addition, there are benefits to the existing ESD system that the Fund will not be able to replicate. To name but one, “entrepreneurs nurtured by corporates have a far greater chance of access to markets because they can be integrated into the company’s supply chains,” as Ms Mavuso writes.²³

Toby Chance, Democratic Alliance (DA) spokesperson on trade, industry and competition, has warned that the Fund “threatens to undo the ESD support many thousands of existing black businesses depend on.” Adds Mr Chance:

“The ANC’s plan to centralise ESD spend in a government-controlled pool will disrupt this system. Black suppliers who now receive direct, industry-specific support will be

¹⁹ Theobald, S, “Transformation Fund worsens disease of ‘inputitis’,” Business Day, 26 March 2025. <https://www.businessday.co.za/bd/opinion/columnists/2025-03-26-stuart-theobald-transformation-fund-worsens-disease-of-inputitis>.

²⁰ Stuart, *ibid*.

²¹ Stuart, *ibid*.

²² Gon, S, “Parks Tau’s perverse R100bn Transformation Fund,” Daily Friend, 22 January 2025. <https://dailyfriend.co.za/2025/01/22/parks-taus-perverse-r100bn-transformation-fund>.

²³ Paton, *ibid*.

forced to navigate a slow, bureaucratic and politicised process to access essential resources. No government can possibly know the strategic supply needs of a myriad complex industries. [Hence,] large-scale failure is inevitable.”²⁴

Mr Chance also asked leading practitioners in the ESD field for their views on the benefits of the existing system, as compared to the proposed Fund. Most expressed major concerns about shifting to the latter. One asked whether the Fund would have the capacity to choose “black-owned businesses [with] the real capability to deliver goods and services to meet real market needs?” Another pointed out that “companies implementing ESD strategies and programmes base them on years of testing various models and activities.” That expertise, which has been carefully built up over time, is vital in meeting both “transformation objectives” and “strategic business objectives and operational needs.”²⁵

Another major issue, as another ESD expert has pointed out, is that “companies now have a line of sight and can follow their ESD funding to the point of utilisation. [They can] thus measure the economic value to the beneficiary and to their own business.”²⁶ This feedback loop is crucial.

By contrast, the Fund is unlikely to have the same capacity to assess what value, if any, its contributions are adding. It will also have incentives to exaggerate its achievements so as to justify its continued existence. In addition, its main focus is unlikely to be on entrepreneurs with sound business plans and the capacity to wean themselves off state support.

Mr Cohen explains why this is so, saying: “There are already enormous pots of money devoted to government-sponsored business creation and they are all failing. The reason is obvious: if you start a business founded on a gift, you are not in the business of selling something; you are in the business of receiving gifts. When the first gift runs out, what you will need to stay in business is another gift. And another one. And another one.”²⁷ Nor is it surprising that this becomes the pattern when state funding is in issue. Notes Mr Cohen: “Government-run business labs [have an] incentive structure [that is] is totally misaligned. They are not looking for good ideas; they are looking for good gift recipients.”²⁸

When businesses take the lead in incubating new SMEs, their incentives are different and far more constructive. As Mr Cohen adds, when businesses seek to expand their supply chains, their aim is to establish viable new enterprises that are likely to add value to their operations over time. To help achieve these outcomes, they often provide loans, rather than donations, to new SMEs. As Mr Cohen puts it, these companies are “not in the business of giving away money” and their hope is that the contributions they make will “with any luck, come back over the years.”²⁹

²⁴ Ensor, L, “Transformation Fund draft proposal published,” Business Day 19 March 2025.

<https://www.businessday.co.za/bd/national/2025-03-19-transformation-fund-draft-proposal-published>.

²⁵ Chance, T, “Rethink needed over R100bn Transformation Fund,” Business Day, 22 January 2025.

<https://www.businessday.co.za/bd/opinion/2025-01-22-toby-chance-rethink-needed-over-r100bn-transformation-fund>.

²⁶ Ibid.

²⁷ Cohen, “After the Bell: Parks Tau’s terrible transformation fund,” op. cit.

²⁸ Ibid.

²⁹ Ibid.

The dtic seems to think (as its March 2025 concept paper on the Fund asserted) that a state-run fund will have the major advantage of being willing to invest where the private sector would be too afraid to venture. By contrast, it says, the Fund would be willing and able to invest “in risky township and rural businesses.” However, for the state to spend scarce monies without obtaining adequate returns is no real help to anyone. Instead, it is likely to result in bad debts that will have to be written off in due course.

This pattern is already evident at the Small Enterprise Finance Agency (SEFA). As journalist Carol Paton points out, “SEFA falls under the Department of Small Business Development, a spin-off of the dtic. [It was] established to fund small and medium enterprises (SMMs) that are unable to attract commercial credit.” It thus has essentially the same function as the proposed new Fund. SEFA also has a “68% impairment ratio,” which is extremely high and shows that its risky investments are generally not yielding returns. Against this background, it is unlikely that “the Transformation Fund would do much better,” as the CEO of the SA SME Fund, Ketso Gordhan, has warned.³⁰

4.6 No clarity on the governance of the Fund

The draft BEE Codes are largely silent on the key issue of how the Fund is to be governed. According to law firm Webber Wentzel, additional information on the Fund’s website suggests that “it will be administered by a special-purpose vehicle with a board appointed by the minister and an oversight committee including public- and private-sector representatives.” In addition, Mr Tau has previously indicated that governance is to be “independent”, with “regular reporting to Parliament and the Broad-Based Black Economic Empowerment Commission to mitigate risks of misuse.”³¹

Mr Cohen is sceptical. When the concept paper was published in 2025, he noted that “Tau’s idea was that the [Fund] would be overseen by a joint board of directors made up of eight people.” There would also be an oversight committee, which would be made up of “three ministers and five members from the business and social groups”. Added Mr Cohen: “So, it seems as though business will have some sort of say about it all. But who are these ‘social groups’? What is a social group? Are they a group of friendly people? Perhaps they are tame, government-supporting NGOs that possess sufficient lapdog credentials to get appointed to this government boondoggle and to stay that way. And the kicker is that Tau appoints everyone. There are going to be no independent voices here, thank you very much.”³²

Dr Theobald emphasises that the Fund must not only be well governed but also have “a clear asset management strategy.” However, the draft BEE Codes provide no clarity here. Nor has a SEIA report been made available to help fill this gap and give the public the chance to “know about these issues” and then have “a proper say,” as the Constitution requires. As Dr Theobald has pointed out, no information has been provided on “what instruments [the Fund] will use to

³⁰ Paton, *ibid.*

³¹ Moonstone Information Refinery, “Transformation Fund Moves into B-BBEE Scorecards as Draft Codes Signal Policy Shift,” 26 February 2026. <https://www.moonstone.co.za/transformation-fund-moves-into-b-bbee-scorecards-as-draft-codes-signal-policy-shift>.

³² Cohen, “After the Bell: Parks Tau’s terrible transformation fund idea,” *op. cit.*

fund businesses (loans or equity investments), what targets it will have for these each year, and what [its] return objectives [will] be.”³³

4.7 Increased reporting requirements for business

The proposals add to the reporting burden on business. As earlier noted, the draft BEE Codes will require measured entities that make contributions to Enterprise Development, Supplier Development and/or the new Fund to “submit a needs analysis, performance metric (with outputs and outcomes such as turnover growth, job growth, increased access to local and international markets, increase in profitability, greater innovation), and an annual Monitoring and Evaluation report.”³⁴

These obligations are onerous and will add considerably to the costs of compliance. Companies that make ESD contributions to entities they are actively involved in mentoring and assisting should have much of this information at their disposal – though some of the necessary evaluation may not be straightforward and could take time to provide.

However, companies contributing to the Fund will have no line of sight as to where their contributions may end up and what effects they might be having. “How then,” as one ESD expert commented to Mr Chance, “will individual company contributors to these pooled funds be able to measure the economic value of their contributions?”³⁵ These companies will nevertheless be expected to provide detailed information on the “turnover growth, job growth, increased access to local and international markets, increase in profitability, [and] greater innovation” of the Fund’s beneficiaries. Such information is for Fund officials to assemble – not companies with no control over how their contributions are being used.

What would be feasible, by contrast, would be for companies contributing to the Fund to report each year on how their *own* “turnover growth, job growth, increased access to local and international markets, increase in profitability, [and] greater innovation” has been negatively affected by their contributions to the Fund. Every rand that goes to the Fund is a rand less for these companies to spend on boosting their own productivity and market penetration. Over time, this annual drain on their resources is likely to reduce their efficiency and erode their competitiveness. These costs should be analysed – along with the high impairment rates the Fund is likely to experience – so that the most obvious net costs to the economy can at least be computed.

4.8 Increased risks of corruption and abuse

The draft BEE Codes could become a vehicle for increased corruption and wasteful spending in at least two ways: first, via the revised preferential procurement rules and, second, through the introduction of the Fund.

4.8.1 The risks in the new preferential procurement rules

The new preferential procurement rules will be binding not only on many companies in the private sector, but also on state-owned enterprises (“SOEs”) and other “organs of state” in all

³³ Theobald, “Transformation Fund worsens disease of ‘inputitis’,” op. cit.

³⁴ Point 4.5, Draft BEE Codes.

³⁵ Chance, “Rethink needed over R100bn Transformation Fund,” op. cit.

three spheres of government.³⁶ Yet organs of state are obliged, under Section 217 of the Constitution, to ensure that their procurement contracts are “fair, equitable, transparent, competitive and cost-effective.” This obligation “does not prevent” them from implementing preferential procurement policies, provided these meet the *Van Heerden* tests (as described below). However, if they decide to make preferences available, they must do so within a “framework” prescribed by national legislation.

At present, the only framework statute in force is the Preferential Procurement Policy Framework Act (“PPPFA”) of 2000. This does not provide for public tenders to be set aside or reserved for the benefit of particular groups, as the draft BEE Codes envisage. It does, however, allow black-empowered firms to charge higher prices than their competitors and still win state tenders. The price inflation permitted is officially capped at 25% for contracts valued at R50m or less and at 11.1% for contracts above that. Often, however, the BEE premiums granted in practice far exceed the permitted mark-ups.

The upshot is that many public procurement contracts are concluded at inflated prices well above market ones. Some of the BEE “premiums” paid fall within the limits of the PPPFA and are authorised by it. However, many BEE “premiums” go way beyond what the PPPFA allows and are rooted in fraud and corruption. The National Treasury tends to brush this problem aside. However, two of its most senior officials have at times acknowledged the extent of the resulting losses to the fiscus.

In October 2016 the Treasury’s chief procurement officer, Kenneth Brown, said that between 30% and 40% of the state’s annual procurement budget (then worth R600bn) was being lost to “fraud and inflated prices”.³⁷ In August 2018 his acting successor, Willie Mathebula, told the Zondo commission of inquiry into state capture that “the government’s procurement system was deliberately not followed in at least 50% of all tenders.” Moreover, once the normal rules had been bypassed, “a contract which started at R4m was soon sitting at R200m.” This had enormous ramifications, for the government was “the biggest procurer of goods and services, spending [at that time] an estimated R800bn a year”.³⁸

The government’s procurement budget has since risen to some R1.2-trillion a year, while BEE premiums have increased too. The Treasury has failed to report on the amount of revenue being lost each year to authorised and illegal BEE premiums – but the IRR estimates the current total at R150bn a year.³⁹ The cumulative cost of BEE premiums over many decades has thus been enormous. BEE tenderpreneurs have benefited considerably, but the poor have been badly hurt. Every public procurement contract concluded at an inflated price leaves less revenue available for other needs and undermines the state’s efficiency.

³⁶ Para 3.1, Draft Statement 000 of 2026.

³⁷ “Shocking levels of fraud and inflated prices cost South Africa R233 billion”, BusinessTech, 6 October 2016. <https://businesstech.co.za/news/government/139193/shocking-levels-of-fraud-and-inflated-prices-cost-south-africa-r233-billion/>.

³⁸ News24.com, 21 August 2018

³⁹ Jeffery, “Gqubule is wrong”, op. cit.; Crouse, G, *The IRR’s Blueprint for Growth: Cut VAT and BEE*, Institute of Race Relations, 2025. <https://irr.org.za/reports/the-irrs-blueprint-for-growth/the-irr-blueprint-for-growth-2025/2-the-irrs-blueprint-for-growth-2-cut-vat-and-bee>.

Having spent four years investigating corruption during the state capture years, the Zondo commission of inquiry concluded that many of the abuses it had uncovered were rooted in damaging preferential procurement practices in the public sector. Having noted the Constitution’s emphasis on the need for competitive and cost effective procurement, Judge Raymond Zondo concluded that “the primary national interest is best served when the government derives the maximum value-for-money in the procurement process.” He also stated that “procurement officials should be so advised.”⁴⁰ Instead, however, achieving “value for money” in public procurement is likely to become still more unattainable under the draft BEE Codes.

The Draft BEE Codes effectively require organs of state to set aside or reserve a portion of their procurement contracts for companies that are 100% black-owned, 100% black women-owned, between 51% and 99% black-owned, and/or 30% black-women owned. This requirement is contrary to both the PPPFA and Section 217 of the Constitution. It could exclude many experienced companies from tendering at all, thereby further undermining efficiency and cost-effectiveness. It is also likely to result in even greater price inflation and further undermine the “value-for-money” procurement that Judge Zondo recommended as a key antidote to corruption.

4.8.2 The danger that the Fund may be abused

Though the private sector might be granted a limited role in the governance of the Fund, most of the day-to-day decisions on which firms are to receive ESD financing will be made by the bureaucrats working for the Fund. Many of these officials are likely to be deployed cadres of the African National Congress (ANC). These cadres will be appointed for their loyalty to the ANC – and their willingness to help expand its patronage network – rather than for their capacity to provide effective mentoring and other help to the Fund’s beneficiaries.

Many of these cadres may also see their jobs with the Fund as providing opportunities for their own self-enrichment. Some, at least, will be willing to direct ESD financing to SMEs set up by their friends and relations primarily for the purpose of siphoning off monies from the Fund. Cadres may also want kick-backs for themselves for agreeing to the inflated prices new SMEs may want to charge. There is thus a considerable danger, to cite Ms Joffe, that the Fund could become a vehicle for “high-level looting.” Mr Chance agrees, saying the proposed new entity “risks being a slush fund and is open to abuse.”⁴¹

4.9 Adding to the burden and the costs of BEE

BEE is a fake form of transformation which has already greatly widened intra-black inequality by enriching a small black elite while excluding – and actively harming – the poor black majority.

⁴⁰ Commission of Inquiry into State Capture Report, Volume 1, p. 797; Crouse, G, The IRR’s Blueprint for Growth: Cut VAT and BEE,” IRR, February 2026, p. 7. https://irr.org.za/reports/the-irrs-blueprint-for-growth/the-irrs-blueprint-for-growth-2026/cut-vat-bee-premiums_2026.pdf

⁴¹ Joffe, “Tau’s proposed Transformation Fund raises real concerns,” op. cit; “New BEE tax for South African businesses planned,” Daily Investor, 19 January 2025. <https://dailyinvestor.com/business/74839/new-bee-tax-for-south-african-businesses-planned>.

Since the ANC came to power, vast resources have been poured into meeting BEE ownership, management and procurement targets. Those resources include the R1 trillion to R2 trillion required for ownership deals, along with the massive BEE premiums – currently some R150bn a year – being paid on public procurement contracts. Yet almost all the benefits of BEE have gone to a relatively small black elite, many of whom are deployed ANC cadres. A few, including President Cyril Ramaphosa, have become billionaires. Many more have become millionaires able to afford high levels of conspicuous consumption.

Very few benefits have flowed to the great majority of poor black South Africans. This is not surprising, as most black people have little or no prospect of ever obtaining lucrative BEE deals, management posts, or preferential tenders. At the same time, however, most black South Africans have been greatly harmed by dysfunctional state services, a moribund economy and the massive unemployment that BEE has helped to foster.

In addition, BEE rules are so extraordinarily complex and difficult to understand that this in itself is a major barrier to direct investment in South Africa. BEE rules have often been amended too, generating much uncertainty – and great concern – as to what further shifts might lie ahead.

In 2017, the local subsidiaries of US companies operating in South Africa identified BEE as one of the main obstacles to doing business here. Verbatim comments by US firms included:⁴²

- “The cost of doing BEE is increasing every year;”
- “We are spending a huge amount of man hours trying to...understand the BEE regulations, never mind the amount of time we spend actually complying;” and
- “No one plays a game where the goal posts keep moving.”

Now the Draft BEE Codes are seeking to move the goal posts yet again by ratcheting up preferential procurement obligations and introducing what amounts to a new BEE tax. These shifts, as Ms Gon has cautioned, will “exacerbate the disinclination to invest.”⁴³ The impetus for private sector firms to *disinvest* could accelerate too, especially as South Africa contributes less than 0.5% to the global economy and has lost much of its earlier importance as the main gateway to Africa.

5 THE UNCONSTITUTIONALITY OF THE DRAFT BEE CODES

The draft BEE Codes conflict with at least four provisions of the Constitution.

5.1 Section 217 of the Constitution

As earlier outlined, the Draft BEE Codes effectively oblige SOEs and other organs of state to set aside or reserve a significant number of procurement contracts for companies that are 100% black-owned, 100% black women-owned, between 51% and 99% black-owned, and/or 30%

⁴² American Chamber of Commerce in South Africa, *Investment Climate in South Africa for American Companies, 2015/2016*, Johannesburg, February 2017, p. 11.

⁴³ Gon, “Parks Tau’s perverse R100bn Transformation Fund,” op. cit.

black-women owned. However, such set-asides are contrary to Section 217 of the Constitution and the only “framework” statute which is currently in force: the PPPFA.

In addition, Section 217 of the Constitution speaks solely of preferential procurement by the state and *not* by private businesses. Since different wording could have been used, the intention was clearly to confine preferential procurement to the public sector and not expect it of the private sector too. (This interpretation flows from the Latin maxim *expressio unius est exclusio alterius*, which means that the inclusion of the one thing implies the exclusion of the other.) Hence, the attempt in the Draft BEE Codes to compel companies to comply with still stricter preferential tendering rules is also at odds with Section 217.

5.2 Section 1(c) of the Constitution

The Draft BEE Codes are also in conflict with Section 1(c) of the Constitution, which identifies “non-racialism” as a founding value of South Africa’s democracy. Classifying people into the same four racial groups as in the apartheid era is inconsistent with this value. So too is giving preferences to some South Africans while excluding others.

5.3 Section 9 of the Constitution

In addition, the Draft BEE Codes are at odds with Section 9 of the Constitution, which prohibits unfair discrimination on racial grounds by both organs of state and private entities. This section also says that any discrimination based on race is automatically unfair unless, in essence, it falls within the parameters of Section 9(2).

Many commentators have long assumed that BEE is implicitly authorised by Section 9(2), which allows the taking of “legislative...measures designed to...advance [those] disadvantaged by unfair discrimination” and “promote the achievement of equality.” However, as the Constitutional Court ruled in the *Van Heerden* case in 2004, race-based remedial measures are valid only if they satisfy three tests: they must (1) target the disadvantaged, (2) help advance them, and (3) promote equality.⁴⁴

The Constitutional Court has never properly applied these tests in adjudicating on BEE. Were it to do so, however, BEE rules would fail on all three grounds. First, BEE does not target the disadvantaged, for it helps only a relative elite (the most advantaged 15% within the black population) and not the great majority of poor black people. Second, BEE has failed to “advance” the black majority. Instead, it has greatly harmed most black people by triggering (in the words of IRR CEO Dr John Endres) “stagnation, unemployment,...disinvestment, and corruption.” Third, BEE has failed to “achieve equality,” for it has enriched only the few while keeping the great majority of black South Africans unskilled, unemployed, and mired in destitution. BEE is thus a key part of the reason why the Gini coefficient of income inequality is higher now – at 67 in 2025 – than it was at the end of the apartheid era, when it stood at 57.⁴⁵

The South African Communist Party (SACP) has acknowledged that the “intra-African inequality” that BEE has fostered is “the main contributor to South Africa’s extraordinarily high

⁴⁴ *Minister of Finance and another v Van Heerden*, 2004 (6) SA 121 (CC).

⁴⁵ Endres, J, “Pulling up instead of trickling down: an alternative to BEE”, *Daily Friend*, 27 September 2025. <https://dailyfriend.co.za/2025/09/27/pulling-up-instead-of-trickling-down-an-alternative-to-bee/>.

Gini coefficient” of income inequality. Commented the party in 2017: “Enriching a select BEE few via share deals...or (worse still) looting public property...in the name of broad-based black empowerment is resulting in....increasing poverty for the majority, increasing racial inequality, and persisting mass unemployment.”⁴⁶

The Draft BEE Codes will further entrench these adverse outcomes. Both the new procurement rules and the additional ESD contributions to be made to the Fund will be used by a relatively small group to enrich themselves still further. By contrast, the great majority of South Africans will have little or no prospect of obtaining any benefit from the new rules. If anything, the Draft BEE Codes will reduce efficiency and add to costs. As ever, the poor will bear the brunt of this malaise, while intra-black inequality will widen further. This is not genuine empowerment. Rather, as Dr Endres writes, it is “a clientelist project that shunts benefits towards connected elites while making life worse for the poor, most of whom are black.”⁴⁷

5.4 Section 213 of the Constitution

As earlier noted, Section 213 of the Constitution says that “all money received by the national government must be paid into...[the] National Revenue Fund, except money reasonably excluded by an Act of Parliament.” Yet Mr Tau seeks to direct significant monies into the new Fund without a statute authorising this and without seeking to show that this is “reasonable”.

6 THE WAY FORWARD

In the past year, it has been widely acknowledged, even by proponents of BEE, that the policy is not working as intended. Several commentators have nevertheless claimed that BEE must be retained because there is no credible alternative to it. That claim is false. The IRR has for many years been developing just such an alternative, which it calls Economic Empowerment for the Disadvantaged or EED.

The EED alternative has three core features. First, it is race-neutral, which enables it to target the poor and prevent its benefits being captured by the black elite. Second, it promotes economic growth and employment, which are the essential foundations for upward mobility. Third, it reaches right down right down to the grassroots by seeking to provide millions of disadvantaged South Africans with tax-funded vouchers to help them meet their core needs and so get ahead.

6.1 EED’s race-neutral approach

BEE’s race-based targets are unconstitutional, as earlier outlined. They also undermine the dignity of all South Africans by treating their racial identity as more important than their unique talents and efforts.

In practice, racial targets require the continued classification of all South Africans into essentially the same racial categories as were set out in the Population Registration Act of 1950. Since that statute was repealed by the National Party government in 1991, race classification should have ended some 35 years ago. Instead, race-based BEE has resuscitated an odious system of racial tagging that was rightly condemned across the country and the world.

⁴⁶ Editorial, *The African Communist*, 1st Quarter 2017, Issue 116, February 2017

⁴⁷ Endres, “Pulling up,” op. cit.

At the same time, this race-based approach is unnecessary, despite the self-serving claims of BEE beneficiaries to the contrary. Disadvantage is the issue that needs to be addressed. And disadvantage can be identified directly, via a means test, and without reference to race.

6.2 EED's appropriate scorecard

The BEE scorecards currently contained in the generic and sector codes ignore the vital importance of economic growth. Yet growth provides the rising tide essential in lifting all boats. Private sector contributions are vital to growth – and yet the current BEE scorecards ignore this too. The country needs a different empowerment scorecard that recognises the private sector's vital role in expanding investment, employment, export earnings, innovation and tax revenues.

EED would thus replace all current BEE scorecards with a new one giving companies voluntary EED points for:

- Maintaining and expanding production and/or sales;
- Sustaining and increasing operating profits;
- Retaining and expanding jobs;
- Sustaining and increasing gross fixed capital formation;
- Helping to attract inflows of foreign investment, both direct and indirect;
- Contributing to tax revenues via their own tax payments and the taxes paid by their employees;
- Helping to generate export earnings;
- Funding research and development (R&D) or otherwise contributing to innovation;
- Providing skills training for all staff; and
- Employing and promoting people on an expanded concept of merit, which takes account of how people have countered adversity.

This EED scorecard would be easy to complete, as businesses must in any event keep track of the issues that it covers. Compliance would nevertheless be voluntary, while companies that chose to report on their EED contributions would not be rewarded with preferential access to state permits or public tenders. These are so important to efficiency and competitiveness that they must always be awarded on the basis of capacity and other objective criteria. Instead, companies with high EED scores would be recognised by society for their valuable contributions to growth and upward mobility. This would give them a well-deserved higher standing for the positive part they are playing.

The EED scorecard would also give businesses the option of contributing to the third element in EED: the tax-funded voucher system outlined below. Companies could opt to top up the vouchers of their employees, for example, or they might choose to contribute to a general top-up fund. Such contributions would give firms additional EED points. They would also identify them as particularly responsible corporate citizens helping to increase upward mobility for those most in need.

6.3 EED's tax-funded vouchers for the disadvantaged

EED would reach down to the grassroots by equipping the poor with the sound schooling, housing and healthcare they need to help them get ahead. In the 2026/27 financial year, some R718bn has been budgeted for these vital goods and services, which is a considerable amount.⁴⁸ But the state's centralised and top-down delivery system is so mismanaged and inefficient that outcomes are often extraordinarily poor.

As regards schooling, roughly 81% of South Africa's Grade 4 pupils cannot read for meaning in any language, while 61% of Grade 5 pupils are unable to add and subtract whole numbers.⁴⁹ Not surprisingly, thus, more than half of all pupils drop out of school or fail their final examinations.⁵⁰ In the housing sphere, millions of small and badly built "RDP houses" (named for the Reconstruction and Development programme) have been provided at considerable cost, but the housing backlog (at 2.3 million units) is bigger now than it was in 1994 (1.5 million). In public healthcare, almost 80% of state hospitals and clinics are so poorly managed that they cannot comply with minimum healthcare standards, even on such basics as hygiene and the availability of medicines.⁵¹

EED recognises that current budgets in these spheres cannot be increased significantly. Rather, with public debt approaching 79% of GDP,⁵² the key need is to get far more bang for every tax buck. This can be done by redirecting much of the revenue now being badly spent by bureaucrats into tax-funded school, housing, and healthcare vouchers for the poor. Low-income households empowered in this way would have real choices available to them. Schools and other entities would also have to compete for their custom, which would help keep prices down and push quality up.

South Africans strongly support the voucher idea, as IRR opinion polls over several years have consistently shown. In 2016 some 85% of black respondents expressed support for school vouchers, while 83% endorsed both healthcare and housing vouchers. In addition, 74% of black respondents said these vouchers would be more effective than BEE in helping them to get ahead. Subsequent IRR polling on these issues has repeatedly shown the same pattern, with at least 80% of black respondents supporting school, health and housing vouchers. In 2024, 92% of South Africans favoured school vouchers, 83% supported health ones, and 80% endorsed

⁴⁸ National Treasury, *National Budget Review*, 25 February 2026, "2027/27 Highlights".

<https://www.treasury.gov.za/documents/National%20Budget/2026/review/FullBR.pdf>. Centre for Risk Analysis, "Budget 2026: A sweet treat but SA growth requires more nutrition," Macro Review, February 2026, p. 6.

⁴⁹ Spaul, N, "From bad to worse: New study shows 81% of Grade 4 pupils in SA can't read in any language" *Daily Maverick*, 16 May 2023. <https://www.dailymaverick.co.za/article/2023-05-16-from-bad-to-worse-new-study-shows-81-of-grade-4-pupils-in-sa-cant-read-in-any-language>; Jeffery, A, "Scrap BEE for subsidised private schooling", BizNews 25 February 2019. <https://irr.org.za/media/scrap-bee-for-subsidised-private-schooling-biznews>.

⁵⁰ Fraser, L, "South Africa's shocking school drop-out rate revealed", *BusinessTech*, 10 October 2023: <https://businesstech.co.za/news/government/723902/south-africas-shocking-school-dropout-rate-revealed/>.

⁵¹ *Business Day*, 6 December 2017, *Sunday Times*, 6, 14 January 2018, *The Citizen*, 19 September 2018; Institute of Race Relations, *2019 South Africa Survey*, Johannesburg: Institute of Race Relations, p. 761; *Financial Mail*, 19 July 2018; Office of Health Standards Compliance, *Annual Inspection Report 2016/17*, Pretoria: Office of Health Standards Compliance, 2018, p. 31; Settas, M, "The public health system: Quality, outcomes & medico-legal liabilities", *Daily Friend*, 13 August 2022. <https://dailyfriend.co.za/2022/08/13/the-public-health-system-quality-outcomes-medicolegal-liabilities/>.

⁵² Centre for Risk Analysis, "Budget 2026: A Sweet treat but SA growth requires more nutrition," Macro Review, February 2026, p. 4.

housing vouchers. Asked if vouchers would be more effective in helping them than BEE, 81% answered “Yes” and 12% “No”. (The remaining 7% were undecided or uncertain.)

The best way to provide real opportunities and effective redress for past injustice is to replace BEE with EED. BEE focuses on redistribution and fosters racial division. In practice, it has hobbled investment, exacerbated unemployment, encouraged rent-seeking and corruption and promoted a debilitating dependence on the state.

By contrast, shifting to EED would end race classification, curtail abuses of discretionary state powers and achieve transformation of a truly beneficial kind. By rewarding business for its vital economic contributions, EED would also lift business confidence, encourage investment, promote entrepreneurship, increase the growth rate, and help generate millions more jobs. In addition, the voucher element in EED would offer a swift and effective solution to vital and largely unmet needs for sound schooling, housing and health care.

EED offers the best way forward and should swiftly be embraced. In the interim, and at the very least, the dtic must draw back from the damaging changes the draft BEE Codes propose. If these changes are introduced, it will become even harder to attract investment, push up the growth rate, expand employment and give the poor the chance to get ahead. These poorly drafted provisions – which conflict with the rule of law and another four clauses in the Constitution – should thus be withdrawn.