



**South African Institute of Race Relations NPC**

**SYNOPSIS**

**Submission to the Department of Trade, Industry and Competition**

**Proposed Amendments to the Broad-Based Black Economic Empowerment**

**Codes of Good Practice**

**29 March 2026**

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**Overview**

This synopsis accompanies the IRR’s full submission on the proposed amendments to the Broad-Based Black Economic Empowerment (B-BBEE) Codes of Good Practice, published for public comment on 29 January 2026 by the Minister of Trade, Industry and Competition, Mr Parks Tau.

The IRR’s core submission is that the draft BEE Codes should be withdrawn. The proposed amendments are poorly drafted, procedurally deficient, constitutionally vulnerable, and likely to do serious harm to investment, economic growth, and the black South Africans they claim to help. What follows summarises the main grounds for this conclusion.

**Procedural deficiencies**

The B-BBEE Policy Unit has failed to comply with the government’s rules for public consultation. No socio-economic impact assessment (SEIA) has been conducted, despite the government’s own guidelines requiring one for any proposed law or regulation.

The SEIA system, developed by the Department of Planning, Monitoring, and Evaluation, exists to ensure that the full costs and benefits of proposed regulations are properly evaluated before the public is asked to comment. Without a SEIA, the public cannot make informed submissions – and the government cannot claim to have facilitated their meaningful participation.

The Policy Unit has also failed to comply with the National Policy Development Framework, approved by Cabinet in December 2020. That Framework requires early consultation with stakeholders, evidence-based analysis of policy alternatives, and a willingness to adjust proposals in the light of public feedback. None of this has happened. Instead, the Department of Trade and Industry (“the dtic”) has adopted the “tick-box approach” to public consultation that the Framework explicitly warns against.

The 60-day comment period is also inadequate given the complexity and reach of the proposed changes, which span multiple documents and will affect thousands of businesses.

### **Poor drafting and legal uncertainty**

The draft BEE Codes are riddled with ambiguous, contradictory, and ungrammatical provisions. Key terms are used inconsistently across different sections. The word “and” appears where “or” is apparently intended, and vice versa. Points are numbered in conflicting ways. Entire provisions are so poorly worded that their legal meaning is unclear.

This is not a minor editorial matter. Businesses must be able to understand what the law requires of them. Drafting of this quality makes compliance uncertain and exposes companies to arbitrary and unequal enforcement. It conflicts with the rule of law, which requires that laws be clear enough for those affected to know what is expected of them.

### **The Transformation Fund**

**Compulsory or voluntary?** One contentious proposal in the draft Codes is the introduction of a Transformation Fund (“the Fund”). The Minister has said contributions will be voluntary, and many commentators have accepted this assurance. But the actual wording of the draft Codes tells a different story. The language used for both large enterprises and qualifying small enterprises (QSEs) indicates that companies will have to meet minimum requirements across all four components of the enterprise and supplier development element – including the Fund. If contributions are in fact compulsory, this amounts to a new tax on business, imposed without parliamentary authorisation.

**Capital is not the binding constraint.** The proposed introduction of the Fund is based on the assumption that a shortage of capital is the main obstacle to black business development. The evidence says otherwise. Black businesses face more pressing challenges: a poor skills base, a lack of viable business opportunities in a low-growth economy, inadequate infrastructure, excessive regulation, and unreliable electricity and water supply. Throwing more capital at black business development will not solve those problems.

**Existing financing agencies have excess funds.** South Africa already has various state and private sector agencies tasked with financing and supporting black businesses. The National Empowerment Fund, the Small Enterprise Finance Agency, Business Partners, and the Small Enterprise Development Agency all have balance sheets running into the billions, yet have struggled to deploy their funds effectively or to generate sustainable new enterprises. These agencies have themselves found that non-financial support, such as mentoring and training, matters more than capital injections. There is no reason to believe that a new, centrally managed Fund will succeed where these agencies have not.

**Private sector enterprise development works better.** Under the current system, many companies invest directly in start-up firms within their own supply chains. They mentor emerging businesses, provide industry-specific support, and maintain a direct line of sight over how their contributions are being used. This direct involvement creates stronger incentives for success than a centralised fund ever could. When a company incubates a supplier, it needs that supplier to deliver. A bureaucrat disbursing money from a pooled fund has no such incentive.

Leading practitioners in the enterprise and supplier development field have expressed serious concern that the Fund will disrupt relationships that are already working.

**Governance is unclear.** The draft Codes are largely silent on how the Fund will be governed. Information published on the Fund’s website suggests it will be administered by a special-purpose vehicle with some element of private sector participation, but the draft Codes provide no detail on oversight, asset management strategy, or accountability mechanisms. Given South Africa’s dismal track record regarding state-managed funds, the absence of this essential information is alarming.

### **The preferential procurement ratchet**

The draft Codes dramatically increase the racial procurement requirements imposed on business. Under the current rules, large enterprises can earn a significant number of additional procurement points by buying from suppliers that are 51% black-owned or 30% black women-owned. Under the proposed rules, the targets shift sharply towards 100% black ownership and 100% black women-ownership. The sub-minimum scores needed to avoid penalties also rise.

In practice, this means companies will have to restructure their supply chains to buy more goods and services from a narrower pool of qualifying suppliers. This will not be easy. Poor schooling, low growth, over-regulation, and state inefficiency have long impeded the development of successful black-owned businesses. Forcing companies to procure from an insufficient, inexperienced and often inefficient supply base risks raising costs, reducing quality, and creating new opportunities for fronting and corruption.

The new procurement rules will also bind organs of state, including state-owned enterprises, across all three spheres of government. The Zondo Commission found that many of the corruption abuses that it uncovered were rooted in damaging preferential procurement practices. The draft Codes will extend and deepen these practices, effectively requiring organs of state to set aside procurement contracts for companies defined by racial ownership. Yet this requirement is at odds with the Preferential Procurement Policy Framework Act of 2000 (“the PPPFA”).

### **Constitutional objections**

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

**Section 217** provides that organs of state must procure goods and services in a way that is fair, equitable, transparent, competitive, and cost-effective. Preferential procurement is permitted only within the framework set by national legislation – currently the PPPFA. The draft Codes go well beyond this framework. They effectively require organs of state to reserve procurement contracts for companies defined by racial ownership. They also seek to do so without any authorising legislation. In addition, they expand the preferential procurement obligations imposed on private businesses, which Section 217 neither contemplates nor authorises.

**Section 1(c)** identifies non-racialism as a founding value of South Africa’s democracy. The draft Codes entrench racial classification by sorting South Africans into the same racial categories that were used under apartheid’s Population Registration Act. They make access to economic opportunity depend on racial identity. This is the opposite of non-racialism.

**Section 9** prohibits unfair racial discrimination by both the state and private parties. Many commentators have long assumed that BEE is nevertheless 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.

BEE fails all three tests: it targets people by race rather than by disadvantage; it harms the great majority of black people, rather than helping them to get ahead; and it worsens inequality – especially within the black population. This is evident in the Gini co-efficient of income inequality, which has risen from 57 in 1994 to 67 in 2025. Tellingly, the South African Communist Party has acknowledged that the “intra-African inequality” fostered by BEE is the main contributor to South Africa’s high Gini coefficient.

**Section 213** requires that all money received by the national government be paid into the National Revenue Fund, unless an Act of Parliament provides otherwise. If contributions to the Transformation Fund are compulsory, they function as a tax. No Act of Parliament authorises this levy. Channelling compulsory contributions into a fund outside the National Revenue Fund would breach Section 213.

#### **Increased compliance burden and corruption risk**

The draft Codes impose significant new reporting obligations. Companies making enterprise and supplier development contributions – whether to the Fund or through their own programmes – will be required to conduct needs analyses, compile performance metrics, and produce monitoring and evaluation reports. These requirements are vaguely worded, which will give officials wide discretion to determine what counts as compliance. In addition, companies that contribute to the Fund will have no line of sight over where their money goes or what impact it is having. They will nevertheless be expected to report on outcomes they cannot observe.

The combination of a large, centrally managed fund and weak governance creates obvious risks of corruption and wasteful spending. Many of the officials responsible for disbursing the Fund’s resources are likely to be ANC cadres, deployed by the organisation under its cadre deployment strategy. Some of these officials will face strong temptations to direct resources to politically connected firms. South Africa’s experience with similar funds provides little reason for confidence that the Transformation Fund will be different.

#### **The alternative: Economic Empowerment for the Disadvantaged**

The IRR has developed a detailed alternative to BEE called Economic Empowerment for the Disadvantaged (EED). EED differs from BEE in three key respects. First, it is race-neutral: it targets disadvantage directly, rather than by using race as a proxy for it, which prevents its benefits from being captured by the black elite. Second, it replaces BEE’s complex racial scorecards with a simpler scorecard that rewards companies for maintaining and expanding production, jobs, investment, exports, tax contributions, and skills training. Third, it uses tax-funded vouchers to equip poor South Africans with better schooling, housing, and healthcare –

thereby addressing real barriers to economic participation and upward mobility at the grassroots level.

IRR opinion polls over several years have consistently shown strong public support for this approach. That support is strong among black South Africans, many of whom believe EED would be more effective than BEE at helping them to get ahead.

### **Conclusion**

The draft BEE Codes should be withdrawn. The dtic should conduct a proper socio-economic impact assessment, allow adequate time for public consultation, and engage seriously with the evidence that BEE is not working. The proposed amendments will increase costs, deter investment, deepen racial division, and entrench the capture of economic opportunity by a small elite, all without delivering meaningful benefits to the millions of poor South Africans who need them most.

The IRR also urges the dtic to comply with the National Policy Development Framework of 2020. This makes it clear that “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.” The dtic should thus give serious consideration to EED as the basis for a new approach to economic empowerment: one that is constitutional, growth-friendly, and genuinely targets and advances the disadvantaged.

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