South African Institute of Race Relations NPC

Submission to the Department of Trade and Industry

regarding the draft Phase 2,

Broad-Based Black Economic Empowerment

Codes of Good Practice

gazetted for public comment on 10th October 2014

Johannesburg, 9th December 2014

Ambit of SAIRR Submission

The Department of Trade and Industry (DTI) has invited public comment on the Draft Phase 2 Broad-Based Black Economic Empowerment Codes of Good Practice gazetted on 10 October 2014 (Part 2 of the revised codes). Such comment is now to be submitted by not later than 9th December 2014 (in terms of the department's revised deadline).

The South African Institute of Race Relations NPC (SAIRR) wishes to comment on three of the five Statements covered, these being: [Department of Trade and Industry, Amended Broad-Based Black Economic Empowerment Codes of Good Practice, gazetted for public commentary from 10 October 2014 to 14 November 2014, *Government Gazette*, No 38076, 10 October 2014, p1]

- Statement 003: Amended Guidelines for Developing and Gazetting of Transformation Charters, Sector Codes, and Transformation Plans;
- Statement 103, Recognition of Equity Equivalents for Multinationals; and
- Code Series 600: Codes of Good Practice for Qualifying Small Enterprises.

Introduction

The current generic codes of good practice, which were gazetted under the Broad-Based Black Economic Empowerment Act of 2003 in February 2007 and came into force in August 2008, have been in force for only six years. In this period, as shown in October 2013 via a study commissioned by the DTI itself, companies have made huge efforts to comply with them, in the process chalking up average scores of between 65% and 75%. [*Business Day* 7 October 2013] However, instead of applauding the private sector for its achievements, the DTI is fundamentally revising the requirements for black economic empowerment (BEE).

Revised generic codes – which significantly amend most elements of BEE and make it much harder for firms to earn empowerment points – were gazetted in October 2013 and are scheduled to take effect at the end of April 2015. [*Business Day* 11 February 2014] In this submission, these new codes are referred to as 'Part 1' of the revised codes. Part 1 has since been supplemented by the 'draft Phase 2' of the Broad-Based Black Economic Empowerment Codes of Good Practice (here called 'Part 2 of the revised codes') – and it is these proposals that are the primary subject of this submission.

Many companies – and particularly the qualifying small enterprises (QSEs) covered by Part 2 of the revised codes – are deeply dismayed that the Government is so comprehensively shifting the BEE goalposts after only six years. This has added to policy uncertainty and fuelled fears that BEE interventions are set to intensify still further in the future.

The sweeping changes proposed for QSEs are particularly onerous and will greatly add to the burden on small firms already struggling to survive in an adverse environment of low growth, high inflation, inadequate electricity supply, limited productivity, poor transport logistics, and persistent labour volatility.

Statement 003: Amended Guidelines for Developing Transformation Charters, Sector Codes and Transformation Plans

Sector Transformation Plans

The main change here lies in the proposed introduction of 'sector transformation plans' in sectors which do not already have a sector code or transformation charter. [Clause 4.14, Statement 003] These sector development plans are intended to provide 'policy guidelines to achieve transformation' by individual firms within particular sectors. These plans must be 'approved by the line ministry and gazetted by the minister of trade and industry'. [Clause 4, Statement 003]

The Government will be responsible for identifying the sectors or industries where sector development plans are needed. [Clause 4.2, Statement 003] Prime sectors for government intervention of this kind are probably the pharmaceutical sector, the wholesale and retail sector, the services sector, the motor industry, and the security industry. [Signa presentation, Johannesburg, 28 October 2014]

Though BEE is supposed to be voluntary, the Government plans to lead the process of developing sector transformation plans. This process will start with the appointment by the State of a 'representative sector transformation forum', many of whose members will have been hand-picked by officials. [4.2, 4.3, Statement 003]

The sector transformation plans drawn in this way will have significant clout, for every organ of state and public entity will be obliged to 'apply' these plans in (among other things): [Clause 4.7, Statement 003]

- determining qualification criteria for the issuing of licences and concessions;
- determining qualification criteria for 'other authorisations in respect of economic activity in terms of any law';
- developing and implementing preferential procurement policies;
- determining qualification criteria for the sale of state-owned enterprises;
- developing criteria for entering into partnerships with the private sector; and

- determining criteria for the awarding of incentives, grants, and investment schemes in support of broad-based BEE.

In addition, any firm that conducts business with the State and operates in a sector that has a sector transformation plan will be compelled to comply with the terms of the plan. For the rest, firms will be encouraged to follow relevant sector transformation plans and to use them as 'guidelines' for transformation in their spheres. However, their BEE status will still be measured according to Parts 1 and/or 2 of the revised codes. [Clause 4.10, 4.8, Statement 003]

Sector transformation plans must address all the elements in Parts 1 and 2 of the revised codes, and must also use the same definitions and calculation methodologies. However, they may deviate from the usual requirements on BEE targets, as well as the weightings attached to different targets, provided these deviations are 'justifiable, based on sound economic principles... or empirical research'. [Clause 4.11, Statement 003]

This wording suggests that 'deviations' will be voluntary, and will also be adopted only where this is justified by special circumstances. However, under another provision of Part 2, the setting of different targets will in fact be mandatory, for this clause says that sector transformation plans '*must* set targets which are over and above the minimum targets set out in the Generic Codes'. [Clause 4.11.6, Statement 006, SAIRR emphasis]

A key purpose of sector transformation plans, where these apply, will thus be to ratchet up the already onerous BEE requirements set out in the revised generic codes. This has major implications for firms that do business with the State, or are otherwise obliged to comply with these plans. This obligation may arise, for instance, because they need 'an authorisation in respect of economic activity in terms of any law'. (This wording suggests that, if the Licensing of Businesses Bill of 2013 were to be brought back and enacted into law, as the DTI reportedly plans, every firm in the country would need an 'authorisation' to do business and would thus become obliged to comply with the content of any relevant sector development plan.)

The DTI's proposals could thus result in significant increases in all the current targets in the revised generic codes, from the ownership one to the targets for management control, preferential procurement, and so on. Yet, as one BEE expert has commented: '6% of payroll for training black employees [the target that applies to all larger enterprises under the new generic codes] is already expensive. But even this [expense] will no longer be enough' under the mooted sector transformation plans.

Some firms might want to avoid this ratcheting up of BEE requirements by entering into an approved sector code, as sector transformation plans do not need to be drawn up where a sector code governs. But no such option will in fact be available, as sector codes will in future also be obliged to set targets that exceed those in the generic codes.

Sector codes

Various new requirements will also apply in the drawing up of sector codes, many of which have already been gazetted under Section 9 of the Broad-Based Black Economic Empowerment Act of 2003. All of these existing sector codes will have to be significantly changed before the end of April 2015 so as to comply with Parts 1 and 2 of the revised codes.

According to Part 2 of the revised codes:

- there will be no further transitional period for the implementation of a sector code, which means that all sector codes will have to be radically revised to comply with the revised codes by late April 2015, even though many of these agreed codes still have many years to run; [Clause 3.1.11, Statement 003]
- sector codes will become obliged to set 'targets which are over and above the minimum targets in the generic codes'; [Clause 3.1.6, Statement 003] and
- the relevant line ministry will have to be drawn into the revising of each sector code and will have to provide 'a letter of support' for the revised sector code to the minister of trade and industry. Government control over the drawing up of sector codes is thus to be intensified. [Clause 3.1.10, Statement 003]

The DTI's intention is clearly to oblige business to comply with steadily intensifying BEE requirements. However, with South Africa's projected economic growth rate for 2014 at a scant 1.4% of GDP and more than 8m people unemployed on the expanded definition (which counts discouraged workers), its determination to tie the private sector up in ever tighter BEE knots makes little economic sense.

Statement 103: The recognition of equity equivalents for multinationals

The equity equivalent investment programme (EEIP) applies to multinational companies with operations in South Africa, provided these corporations are subject to global policies on equity ownership that prevent the sale of shares to minorities. DTI approval is necessary for participation in these programmes and, as in the past, is unlikely to be easily obtained.

Significantly, Statement 103 proposes to allow partial contributions to the equity equivalent programme. Under the current codes, participants in this programme are expected to contribute 25% of the value of their South African operations to various approved BEE initiatives. However, they earn no points at all if their contributions fall below the 25% threshold. (By contrast, South African firms that fail fully to meet the 25% target for black ownership are still able to earn some of the BEE points available for ownership deals, as these are awarded on a pro rata sliding scale.) [Clause 2, Statement 103]

This anomaly is now to be resolved. The contribution required will generally remain at 25% of the value of the South African operations of the multinational in question (though multinationals will also be able to make annual contributions of 4% of total revenue from their South African operations, if they so choose). [Clause 4.2, Statement 103] However, multinationals will in future be able to earn ownership points if they contribute less than 25% of the value of their South African operations, provided they contribute at least 40% of this amount. At minimum, their contributions will have to equal 40% of the 25% target, amounting to 10% of the value of their South African operations. [Clauses 4. 2 and 7, Statement 103]

However, this contribution will count only for the relevant 'investment period' and must then be 'topped up'. As Part 2 of the revised codes explains: 'If a Multinational wants to retain its EEIP ownership points at the expiry of [the relevant investment period], then the Multinational will have to reinvest and make an additional contribution into a new Equity Equivalent programme using the Topping-Up principle'. [Clauses 5.1 and 6.1, Statement 103]

The relevant wording in the DTI's proposals is vague, leaving many questions as to how this principle will be applied in practice. The key clause here is Clause 9 of Statement 103, which says 'total contributions that are more than R100m can be considered for an investment period of up to ten years'. In addition, total contributions of between R75m and R100m 'can be considered for an investment period of up to seven years'; total contributions of R50m and R75m 'can be considered for an investment period of up to five years'; and total contributions amounting to less than R50m 'can be considered for an investment period of up to three years'. [Clause 9, Statement 103]

This wording is intrinsically vague. Hence, a multinational which makes an approved contribution of R40m in 2015 will not know if the relevant 'investment period' will last for three years or twelve months. It also remains uncertain how much 'topping up' will in fact be needed. In other words, would the multinational in this example have to contribute another R40m to attain an investment period of 'up to three years', or would a significantly smaller sum suffice?

Under the proposed new rules, contributions to the equity equivalence programme must be approved by the DTI. They are also supposed to contribute to the goals of the Industrial Policy Action Plan, the National Growth Path, the National Skills Development Strategy, or the National Development Plan, not all of which are consistent with one another. [Clause 3.4, Statement 103] In addition, contributions 'must promote and advance' the following areas: [Clause 3.4.7, Statement 103]

- enterprise and supplier development (as defined in Parts 1 and 2 of the codes),
- research and development (R&D) within the country, or
- the development of 'critical and core skills'.

Singling out research and development (R&D) as one of the three areas in which 'equity equivalent' contributions can be recognised suggests that the DTI wants to encourage multinationals to put significant resources into innovation. This is an important objective. However, it is also contradicted by the DTI's simultaneous draft policy document to amend patent (and wider intellectual property or IP) laws to make it much easier for the State to take or bypass patent protection for little or no compensation. Hence, if the R&D focus under the 'equity equivalent' programme is to succeed in making a significant contribution to innovation and the transfer of technology, the DTI's contradictory IP policies should be withdrawn.

Code Series 600: Codes of Good Practice for Qualifying Small Enterprises

Compliance thresholds

Under the current codes, exempt micro enterprises (EMEs) – firms which are automatically exempt and do not have to demonstrate their compliance with BEE rules – are defined as those with less than R5 million in annual turnover. Under Part 1 of the revised codes, the same principle applies, but the threshold for exemption has been doubled, exempt micro enterprises now being defined as firms with annual turnover below R10 million.

Under the current codes, QSEs are defined as those having annual turnover between R5 million and R35 million, while firms with annual turnover above R35 million are regarded as larger enterprises. Under Part 1 of the revised codes, these thresholds have also been changed. QSEs will now be defined as firms with annual turnover of between R10 million and R50 million, while larger enterprises will be those with annual turnover exceeding R50 million. Though these higher thresholds could be seen as signalling an intention to reduce the burden of BEE compliance, they are in fact largely in line with inflation since 2007.

Among enterprises registered for Value Added Tax (VAT), some 878 000 firms have annual turnover of less than R10m and thus qualify as EMEs. In addition, some 34 100 have annual turnover of between R10m and R50m and thus rank as QSEs. The remaining VAT-registered companies, numbering some 11 800, have annual turnover exceeding R50m and qualify as larger enterprises. [Signa presentation, Johannesburg, 28 October 2014]

QSEs face a particular challenge, as they will now have to comply with all elements of BEE, rather than being able to choose four out of seven. Assuming that roughly 20% of QSEs are between 51% and 100% black-owned, this will leave close on 27 300 QSEs with the daunting burden of having to comply – and prove their compliance – with BEE requirements very different from those in the 2007 generic codes.

The challenge will be particularly great for white-owned and white-managed QSEs, which can presently obtain good BEE scores by concentrating on BEE elements other than ownership and management. Under Part 2 of the revised codes, these QSEs will have to plough a major part of their energy and resources into doing ownership deals and increasing black management, as well as meeting all the other new BEE obligations. These demands, as further outlined below, will make it much more difficult for them to expand their businesses, generate new jobs, and help raise the country's low rate of economic growth.

Elements, targets, and points

Part 1 of the revised codes reduces the seven current elements of BEE to five, a shift achieved by combining some of the present elements. Management control has thus been combined with employment equity to generate a single new element called 'management control'. Similarly, preferential procurement and enterprise development have been combined into one element called 'enterprise and supplier development'. None of the existing elements has in fact been removed, as the two ‘eliminated’ elements have simply been incorporated into those that remain.

The fact that all companies (other than EMEs) will now have to comply with all elements of BEE marks a significant change from the present rules. It also means that President Jacob Zuma’s BEE advisory council has won state endorsement for its view that QSEs should not be allowed to choose which aspects of BEE to pursue.

This issue came to the fore in January 2011, when the chairman of the advisory council, Sandile Zungu, urged the DTI to ‘prevent the popular practice by QSEs of choosing the easiest elements to fulfil’. Small businesses objected that the council’s proposal could triple the costs of BEE compliance, but Mr Zungu seemed unconcerned, saying: ‘The long-term gains will be worth any short-term pain for companies . . . Continuous improvement is not a cost-neutral endeavour.’ [*Financial Mail* 21 January 2011; *Finweek* 18 October 2012] However, this perspective ignores the many pressures on the profitability of small business, along with the fact that South Africa already lags far behind comparative developing countries on the size and success rate of its small and medium enterprises.

Under Part 2 of the revised codes for QSEs, the five elements of BEE and the points available for each are as follows: [*The Citizen* 3 October 2013]

BEE elements and points for QSEs under the current and Part 2 codes

Element, new codes	***Points available, current codes***	***Points available, new codes***
Ownership	25	25
Management control	25	15
Skills development	25	25
Enterprise and supplier development (combines ‘preferential procurement’ & ‘enterprise development’)	25	30
Socio-economic development	25	5
Total points available (apart from special bonus points)	100 (QSEs measured on 4 out of 7 elements)	100 (QSEs measured on all elements)

Under the existing rules, QSEs must choose four elements out of seven to implement and can earn a maximum of 25 points on each of these four, so bringing the total BEE points available to them up to 100. Under Part 2 of the revised codes, QSEs will be measured on all five elements and the total points available to them will again be 100. However, they will be able to earn far fewer points on various elements; and particularly for their contributions to socio-economic development (SED).

Part 1 of the revised codes identifies three out of the five elements as ‘priority’ elements, for each of which a minimum level of compliance, amounting to 40% of the points available, must be attained. These three elements are *ownership*, *skills development*, and *enterprise and supplier development*. Under Part 2, QSEs must comply with ownership as a priority element and may choose, as a second priority element, either skills development or enterprise and supplier development. (Larger enterprises do not have this choice, and must comply with all three as priority elements.)

QSEs are thus obliged to obtain a minimum of 10 points out of 25 on ownership, which is automatically a priority element for them. If they choose skills development as their second priority element, they must gain at least 10 points out of 25 here. If they choose enterprise and supplier development as their second priority element, they must gain 12 points out of the 30 available on this element. QSEs that fail to achieve the 40% minimum score on either the ownership element, or the other priority element they have chosen, or both, will have their level of BEE contribution reduced by one level. [*Business Day* 17 October 2013]

Requirements for each element

The key compliance requirements for each of the five elements of BEE are set out below. These elements are dealt with in the order in which they appear in Part 2 of the revised codes.

Ownership (25 points)

Once Part 2 of the revised codes takes effect in April 2015, QSEs which were previously able to focus on other elements of BEE will have to start working towards a target of 25% black ownership. They will also come under pressure to meet at least the 40% sub-minimum requirement.

Many firms which have already entered into ownership transactions may find that their deals do not satisfy the new rules. Ajay Lalu, a BEE analyst, says firms will simply have to ‘restructure or refinance their existing deals’, but the matter is not so simple. Firms may be reluctant to put more time or money into BEE transactions, especially now that the revised codes have shown how easily the relevant rules can be amended. The South African Chamber of Commerce and Industry has criticised the changes, saying they are ‘highly detrimental to business confidence’ and will undermine trust in the Government. [*Finweek* 18 October 2012, *Business Day* 23 January, *The New Age* 14 October 2013]

The new ownership requirements are likely to be particularly difficult for small family businesses to meet. According to Keith Levenstein of EconoBEE, a BEE verification agency, the changes ‘will make it 100% more difficult for white-owned small businesses to maintain their current ratings' without transferring 25% of their assets to black outsiders. Yet family businesses can hardly be expected to bring in people who are not their relatives. Nor is it just and equitable that the burden of providing redress for apartheid wrongs (if this is indeed the rationale for BEE) should fall so heavily on the shoulders of these particular individuals, many of whom already make significant contributions to economic growth, job creation, tax revenues, and redistribution via the budget.

Ironically, Part 1 of the revised codes (which applies equally to QSEs as it does to larger enterprises) will also make it easier for black South Africans who have already done BEE deals worth millions of rands to enter into even more ownership transactions. Under the current codes, firms can earn additional ownership points by bringing in 'black new entrants', who are defined as those whose previous BEE deals have not exceeded R20 million in value. Under Part 1 of the revised codes, this cut-off value is to be raised to R50 million. This will make it easier for many of 'the usual suspects' to keep participating in ownership transactions even though the supposed intention of the new codes is to make BEE more broad-based by extending its benefits more widely. [*The New Age* 15 November 2013] In addition, a black investor who has already gained R49 million in assets or shares on a preferential basis can hardly still be considered 'disadvantaged'.

Management control (15 points)

Under the current codes, 'management control' and 'employment equity' are two separate BEE elements, for each of which 25 points can be earned by QSEs which choose to comply with both. Under Part 2 of the revised codes, QSEs will be able to earn 15 points for management control, as now redefined.

The target for black representation within QSEs at the executive management (ie, board and top management) level will be 50%. The target for black representation for non-executive management (ie, all other management levels: senior, middle, and junior) will be 60%. However, these targets will not be easy to attain when economically active Africans of the right age for management jobs (ie those aged 35 to 64) make up only 38% of the total economically active population. In addition, for white-owned family businesses, bringing black representation at top and other management levels up to around 50% or 60% of total management is likely to mean losing control of the business in question.

At the same time, if a white-owned family business does not adequately meet the targets for black ownership and black management, its overall BEE score under Part 2 of the revised codes is unlikely to exceed 68 points. This would put its level of BEE contribution at level 7. However, since ownership is a priority element, its failure to attain the minimum necessary (10 points out of 25) would see its level of BEE contribution drop by one level to level 8. This would effectively put it in the non-compliant category, irrespective of what efforts it might have made to comply with other elements of BEE.

According to Mr Levenstein of EconoBEE, some 80% of QSEs – many of which have good BEE scores under the current rules – will face a great dilemma. They will either have to sell 25% of their businesses to outsiders and bring in black managers with 50% to 60% control over their enterprises, or see their levels of BEE contribution drop to Levels 7 or 8. At such levels, they will battle to do business with the State and many other enterprises in the country. In other words, they must choose between losing control of the firms they have built up – often single-handedly and with great effort, money, and time – or they must lose much of their capacity to do business at all. [*biznews* 13 October 2014]

Skills development (25 points)

Under Part 2 of the revised codes, the QSE target for expenditure on skills development for black people will increase from 2% of payroll to 3% of payroll. This contribution will, again, be over and above the skills development levy payable to the State, which is currently set at 1% of payroll.

QSEs which choose skills development as their second priority element must attain at least 10 points out of 25 (the 40% minimum), failing which their level of BEE contribution will be reduced by one level.

Comments one BEE specialist comments: 'One often hears that QSEs are training their employees to death.' The impetus towards this is likely to increase under Part 2 of the revised codes. Though the proposals do give QSEs the option of also providing training for people who are not their employees, most businesses may see little practical value in training outsiders.

In addition, if firms are to earn any points at all on this element, the training provided by QSEs must comply with the Skills Development Act of 1998. This means, for example, that QSEs must have a 'workplace skills plan' and 'an annual training report', both of which must have been approved by the relevant sector education and training authority (Seta). But Setas are often so inefficient that trying to meet this requirement could be very difficult, placing a major additional burden on QSEs.

QSEs are also supposed to concentrate their training expenditure on developing 'priority and essential skills'. To identify what these skills are, they may obtain relevant lists from the Setas in their sectors. Again, however, where Setas are functioning poorly, this may in practice be difficult for QSEs to do. QSEs might also differ with Seta officials on the content of the core skills most important to their needs – and could find their better informed views largely disregarded.

In-house training is often the most valuable to employers because it can be tailored to their specific needs, but Part 1 of the revised codes states that training of this kind may not 'represent more than 15% of the total value of skills development expenditure'. This restriction will apply to QSEs as well, and could reduce the practical value of the training they are effectively being compelled to provide.

This element of the revised codes is based on the assumption that skills training for black staff (and other people) will help significantly to reduce the skills deficit within the country. However, on-the-job training by employers cannot easily compensate for the many deficiencies in public schooling or tertiary education in South Africa. This makes effective action to fix the public education system by far the most pressing priority.

Enterprise and supplier development (30 points)

Under Part 2 of the revised codes (as also in Part 1), the new category of enterprise and supplier development carries the most weight in the revised scorecard. For QSEs, however, the maximum points available here are 30 (whereas larger enterprises can score 40 points on this element).

QSEs which choose this as a priority element must score at least 40% of the points available on each of its three aspects: *preferential procurement*, *supplier development*, and *enterprise development*. Should they fall short of the 40% minimum in any of these three spheres, their level of BEE contribution will be reduced by one level. [*The New Age* 14 October 2013]

<u>Preferential procurement (15 points out of 30)</u>

Under Part 2 of the revised codes, the target for preferential procurement for QSEs will be 60% of total annual purchases. However, such procurement will not qualify for any BEE points at all unless all the suppliers from which goods or services are bought meet the definition of 'empowering suppliers' laid down in Part 1 of the revised codes.

EMEs (those with annual turnover of less than R10 million) are automatically recognised as empowering suppliers. For the rest, an empowering supplier is defined in Part 1 of the revised codes as a BEE compliant entity which is a good South African citizen, complies with all regulatory requirements, and meets between one and four specified criteria, depending on its size. QSEs must meet one of these four criteria, whereas larger enterprises with annual turnover exceeding R50 million must fulfil three out of the four.

The four specified criteria are so poorly phrased that they are difficult to understand. It seems, however, that the relevant requirements are:

- at least 25% of the cost of the entity's sales (excluding labour costs and depreciation) 'must be procured from local producers or local suppliers';
- 50% of the jobs it creates must be for black people;
- it must demonstrate 'at least 25% transformation of raw material/beneficiation, which includes local manufacturing, production, assembly, or packaging'; and
- it must spend '12 days per annum of productivity' in assisting black EMEs and QSEs, so as 'to increase their operational or financial capacity'.

Under the current generic codes, firms can score BEE points by procuring goods and services from any business that is recognised as 'black-empowered'. Such recognition is available, among other things, for firms that are 25% black-owned, as well as for QSEs with good scores on four BEE elements other than ownership. At present, thus, procurement from small white-owned firms, or from large listed firms with 25% black ownership, can earn significant BEE points.

Under Part 2 of the revised codes, by contrast, all suppliers will first have to count as 'empowering suppliers' before a QSE can earn any points at all for its purchases from them. In addition, only 15 points out of the 20 will be available for increasing purchases from such suppliers to 60% of annual spending. To qualify for the 5 additional procurement points available, QSEs will have to obtain 15% of their purchases from empowering suppliers that are also 51% black-owned. [The QSE ESD scorecard]

Several BEE proponents have welcomed this shift, but Tony Balshaw, national BEE leader at Mazars, a global audit, tax, and advisory firm, warns that this new requirement simply overlooks 'the reality of the South African economy'. The necessary 51% black-owned firms do not exist. Nor can they easily be created, especially given the combination of low growth and high inflation that the South African economy confronts.

<u>Supplier and enterprise development (10 points out of 30)</u>

Here, QSEs are expected to contribute 1% of net after-tax profit to 'supplier development', so as to assist enterprises which form part of their supply chains. They must also provide another 1% of net profit after tax for 'enterprise development', so as to help build up businesses that operate outside their supply chains.

According to Part 1 of the revised codes (which applies also to QSEs), beneficiaries of supplier and enterprise development contributions must be EMEs or QSEs which are 'at least 51% black-owned or at least 51% black women-owned'.

This means that contributions to enterprises with less than 51% black ownership will not qualify for BEE points at all. Hence, QSEs which choose this element as their second 'priority' element but fail to direct 2% of their net profit after tax to 51% black-owned enterprises within and outside their supply chains will not be able to meet the 40% minimum requirement (4 points out of 10). They will thus have their level of BEE contribution reduced by one level.

This again ignores the shortage of 51% black-owned firms and the difficulty of creating them in the current economic environment. Says Ajay Lalu, BEE analyst at Black Lite Consulting: 'It's going to be particularly challenging to find the right suppliers, to invest the right quantum, and to invest this on an annual basis.' [*Mail & Guardian* 25 October 2013]

Moreover, under the current codes, QSEs can earn 25 points (much more than the 10 points available under Part 2) for putting 2% of net profit after tax into helping enterprises that do not have to be 51% black-owned. Now the threshold requirement of 51% black ownership must be met before any points at all can be scored in this sphere. In addition, though the contribution required is to stay the same (at 2% of net profit after tax), the maximum points available will decrease sharply from 25 to 10. This too will greatly add to the BEE burden on QSEs.

Socio-economic development (5 points)

Under the current codes, QSEs which opt to focus on this element (as one of the four they must choose) are able to score 25 points out of 100 for their contributions here. As shown in an annual monitor of BEE by audit firm KPMG, many QSEs have concentrated on this element of BEE, using it to gain the full 25 points available. Earning BEE points here is easier than it is on other elements in the codes, especially for small firms, while socio-economic development is also the only element in the codes that is truly broad-based.

Under Part 2 of the revised codes, QSEs will be able to earn a mere 5 points, rather than 25, for their contributions here. Moreover, even these 5 points will be difficult to earn, as only contributions aimed at helping beneficiaries to earn an income will count. Yet many of the charities now being supported do not have such objectives, as their purpose is rather to help those in need, including the old and the ill.

Levels of BEE contribution

Under the present codes, a company (call it Company A) which attains 65 points on the scorecard ranks as a 'level 4' contributor to BEE. This gives it a 'level of BEE recognition' of 100%, which means that every R100 spent on buying goods and services from Company A counts as R100 in calculating the BEE points of the purchaser.

The points required for different 'levels of BEE contribution' under the present rules are set out in the following table:

Qualifying points	**Level of BEE contribution**	**Level of BEE recognition**
100 or more	Level 1 contributor	135% (R100 ≡ R135)
85-100	Level 2 contributor	125% (R100 ≡ R125)
75 -85	Level 3 contributor	110% (R100 ≡ R110)
65-75	Level 4 contributor	100% (R100 ≡ R100)
55-65	Level 5 contributor	80% (R100 ≡ R80)
45-55	Level 6 contributor	60% (R100 ≡ R60)
40-45	Level 7 contributor	50% (R100 ≡ R50
30-40	Level 8 contributor	10% (R100 ≡ R10)
Less than 30	Non-compliant	0% (R100 ≡ R0)

Under the scorecard in Part 1 of the revised codes – which will apply to both QSEs and larger enterprises – the number of points needed to gain good BEE rankings will be very much higher. Hence, a firm with a score of 65 points, which currently counts as a level 4 contributor with a recognition level of 100%, will drop to a 'level 7' contributor with a recognition level of only 50%. To regain ‘level 4’ status under the new codes, such a firm will have to score an additional 15 points and so increase its total score to 80 points.

The points required for different levels of BEE contribution under the Part 1 of the revised codes are as follows: [*The New Age* 14 October 2013]

Qualifying points	**Level of BEE contribution**	**Level of BEE recognition**
≥ 100 points	Level 1 contributor	135% (R100 ≡ R135)
≥ 95 but < 100 points	Level 2 contributor	125% (R100 ≡ R125)
≥ 90 but < 95 points	Level 3 contributor	110% (R100 ≡ R110)
≥80 but < 90 points	Level 4 contributor	100% (R100 ≡ R100)
≥ 75 but < 80 points	Level 5 contributor	80% (R100 ≡ R80)
≥ 70 but < 75 points	Level 6 contributor	60% (R100 ≡ R60)
≥ 55 but <70 points	Level 7 contributor	50% (R100 ≡ R50
≥ 40 but < 55 points	Level 8 contributor	10% (R100 ≡ R10)
< 40 points	Non-compliant contributor	0% (R100 ≡ R0)

Under Parts 1 and 2 of the revised codes, the cost of BEE compliance for QSEs is thus likely to double, at the very least. All companies will find it much more difficult to gain or retain good BEE scores under the revised generic codes, but QSEs will be the worst affected. Under the revised codes, they will enjoy few benefits compared to larger companies, and are also likely to find their new empowerment obligations particularly onerous.

Tony Balshaw of Mazars agrees with other BEE commentators that ‘family or owner-managed . . . businesses that do not have majority black ownership are unlikely to achieve more than a level 7 recognition. The median will probably be level 8’. On this basis, procurement from these businesses will count as a mere R10 for every R100 spent. [*Business Report* 24 October, *Mail & Guardian* 25 October 2013] In these circumstances, many of these firms might give up on BEE, deciding that further efforts to improve their scores are simply not worth the time, money, or loss of autonomy required.

Verification of BEE status

Under Part 1 of the revised codes (as under the current ones), the BEE status of an EME will be deemed to be that of a ‘level 4 contributor’. This will give such an enterprise a ‘BEE recognition level’ of 100%, which means that any procurement from it will count in full as

R100 for every R100 spent, irrespective of the racial complexion of its ownership. Under Part 1 of the revised codes, an EME which is also 51% black-owned will count as a 'level 2 contributor', giving it a BEE recognition level of 125%. In addition, any such enterprise which is 100% black-owned will be regarded as a 'level 1 contributor', with a BEE recognition level of 135%.

Part 1 of the revised codes will also allow EMEs to avoid the costly process of having their BEE status verified by an accredited ratings agency. Instead, such enterprises will be required 'only to obtain a sworn affidavit on an annual basis'. This affidavit must confirm the EME's 'annual total revenue' at less than R10 million, as well as its 'level of black ownership'. Any misrepresentation in such an affidavit will 'constitute a criminal offence' and be punishable under the Broad-Based Black Economic Empowerment Amendment Act of 2013 (the BEE Amendment Act), most of which came into effect on 24 October 2014. In addition, any start-up enterprise will automatically qualify as an EME for a year after its formation, even if its turnover in that year in fact exceeds R10 million.

Similar rules will apply to QSEs. An enterprise of this kind which has 100% black ownership will count as a 'level 1' contributor and will be entitled to a 135% level of recognition (R135 for every R100 spent in buying from it). A QSE which is 51% black-owned will be deemed to be a 'level 2' contributor, with a 125% recognition level. QSEs will also be spared the costly verification process; and will simply have to submit annual affidavits confirming their annual total revenue (between R10 million and R50 million) and their levels of black ownership. The aim of these new rules, says Dr Rob Davies, minister of trade and industry, is to 'remove the burden on small black business to prove that they are black'. [*Mail & Guardian* 25 October 2013]

However, what the changes also mean is that 100% black-owned businesses with annual turnover of less than R50 million will merely have to provide a sworn affidavit to be accorded level 1 BEE status. This will give them significant advantage in tendering for both state and corporate contracts. In the words of Kate Moloto, chairperson of the Association of BEE Verification Agencies, the new rules could thus 'open the floodgates to fronting', despite the DTI's apparent determination to stamp this out under the BEE Amendment Act. [*Mail & Guardian* 25 October 2013]

The rules could also undermine the supposedly broad-based nature of BEE by making it unnecessary for black-owned firms with less than R50 million in annual turnover to bother about training black staff or implementing other elements of BEE. This will diminish the broader societal benefits of BEE requirements. It will also give these black-owned firms yet further advantage over their competitors which, unlike them, will have to 'spend as much as 3% of their payroll on training, develop complex executive development programmes, sell off portions of their business to black people, and ensure their workforce is broadly representative of the economically active population', says BEE analyst Paul Janisch. [*Business Day* 22, *Mail & Guardian* 25 October 2013]

Ramifications of Part 2 of the revised codes for QSEs

Part 2 of the revised codes, with their emphasis on equity deals, have unexpectedly increased the importance of the ownership element. According to Xolani Qubeka, chief executive of the Black Business Council, a BEE lobby group, the new ownership requirements are an important 'step in the right direction'. Under the current codes, he says, white businesses have used BEE deals to 'buy the support and influence of a few well-connected blacks' and so 'ensure their survival in the new democracy', but they have 'done little to encourage or support emerging black businesses'. The new codes will now see 'bona fide black business people buying [sufficient] stakes in traditionally white-owned companies to acquire skills, critical mass, economies of scale, and access to markets'. [*Sunday Times* 26 May, *The New Age* 3 October, *Mail & Guardian* 25 October 2013] However, as journalist Chris Barron has noted in the *Sunday Times*, Mr Qubeka battles to explain just why the new codes should have this positive outcome.

Several BEE proponents seem particularly pleased about the new element of enterprise and supplier development, saying this will ensure that BEE becomes more 'broad-based'. Sibani Mngadi, a BEE analyst, believes that the revised codes will generate many more small and medium enterprises that are 51% black-owned. In his view, since established firms will gain few BEE points for buying from enterprises with only 25% black ownership, they will have little choice but to create a large number of new small businesses that meet the 51% black-ownership requirement. This process will be further encouraged by the 'enterprise development' requirement, under which firms wanting BEE points will have to create and then build up 51% black-owned enterprises capable of operating either within and outside their supply chains. [*City Press* 20 October 2013]

However, this analysis assumes that QSEs, in particular, will have both the resources and the capacity to turn black start-ups into successful enterprises, despite the many practical obstacles against this. As *Business Day* commented in a November 2013 editorial: 'Private sector incubators, some linked to the enterprise development arms of large corporations, find that it is expensive, time-intensive and difficult to grow new businesses. Access to finance, business support, expertise, and markets are essential parts of the mix, none of which is easy to come by.' Hence, contrary to what the revised codes assume, there is no 'quick and easy solution . . . [to] the incubation of small business.'[*Business Day* 27 November 2013]

Requiring QSEs to purchase 60% of the goods and services they need each year from 'empowering suppliers', as now defined, could also increase their operating costs and undermine their efficiency. According to the Black Business Council, 'black businesses [that] don't have the capacity to compete on price' at present will 'in time . . . get the economies of scale and critical mass' they need, which means 'their prices will come down'. [*Sunday Times* 26 May 2013] In the interim, however, the burden on QSEs could be considerable. As experience in many other countries shows, there is also little likelihood that preferences will increase competitiveness – and a significant risk that preferential treatment will instead reduce the incentive for black businesses to up their game.

In addition, as various commentators have warned, Parts 1 and 2 of the revised codes are sufficiently 'draconian and punitive' to 'erode the goodwill that business has shown to BEE' thus far. This might further 'polarise relations between business and Government', which could further reduce investment and economic growth. Some BEE practitioners are also concerned that 'the more stringent regulations will cause public despondency'. Said Chris van Wyk, chief executive of the verification agency AQRate, in June 2012: 'The [BEE] system is a voluntary one. If this thing is going to be forced down their throats, corporate South Africa is going to walk away.' [*Mail & Guardian* 15 June 2012]

Many of these warnings were repeated in October 2012 (when the revised generic codes were first released for comment), but the DTI's chief director of BEE, Nomonde Mesatywa, seemed unconcerned. The draft codes had been 'designed to be more stringent, which meant people would have to do much more than before to earn good BEE scores', she said. She also dismissed the concerns of business, saying 'companies that run with a positive attitude towards BEE have no reason to worry . . . BEE implementation must be pillared (sic) by a positive attitude. They must focus on doing the right thing and points will follow'. [*The New Age* 29 October 2012]

The matter is unlikely to be so simple. Says Mr Balshaw of Mazars: 'The amended codes will turn BEE into a nightmare for business, the Government, and the South African economy.' Compliance costs will increase, if only because the codes have already 'created many grey areas' and these ambiguities are compounded by the revisions, many of which are poorly phrased and difficult to understand. [*Business Report* 30 October 2013]

Above all, the Government has now changed the BEE goalposts; and in a fundamental way. Business had earlier understood that 'BEE would have a limited lifespan' and would remain in place only until 2017. Yet, a mere six years into their implementation, the codes have been fundamentally revised. Says Mr Balshaw: 'Such shifts appear to be unfounded, arbitrary, and politically motivated . . . There is an overwhelming sense that the amendments are draconian and counter-productive.' [*Business Report* 30 October 2013]

In comments made about Part 1 of the revised generic codes – but equally applicable to Part 2 – Dave Steward, chief executive of the F W de Klerk Foundation, warned that the changes are calculated to 'turn up the heat' on established businesses. Moreover, though the State's insistence on demographic representivity in the public service is one of 'the main causes of dysfunctionality in government departments', the new BEE requirements are being used to force the private sector towards the goal of demographic representivity as well. Writes Mr Steward: [Dave Steward, 'Turning up the BBBEE and Employment Equity Heat on White-Owned Businesses', F W de Klerk Foundation, 6 November 2013]

> The public service can continue to function regardless of its performance because it does not have to satisfy customers or produce a profit. However, if companies are unprofitable, they sooner or later go out of business. To succeed, they must appoint and promote key personnel on the basis of merit. They must also procure supplies and services according to price, quality and time of delivery – and not

> race. Moreover, entrepreneurs will not start new enterprises – or maintain existing businesses – if they are not able to enjoy, unhindered, the fruits of ownership . . .
>
> [An insistence on demographic representivity] will make it increasingly difficult for the private sector to produce the wealth and jobs on which the future of the country depends.

Growing economic malaise

Between 2004 and 2007 the global commodities boom and rising consumer and business confidence within South Africa helped bring the economic growth rate up to more than 5% of GDP a year. Since 1994, however, these years of (relatively) high growth have been the exception, rather than the rule. In the first 15 years after the political transition, the growth rate – helped by the four boom years and South Africa's reintegration into the global economy – averaged some 3.5% a year. But since 2009 the annual growth rate has averaged a mere 1.9% of GDP, putting South Africa far behind many other sub-Saharan African countries that are significantly less well endowed with infrastructure, mineral wealth, and other resources. In addition, on a per capita basis, economic growth in 2013 was a mere 0.6% of GDP, even less than the anaemic 1.1% of GDP recorded in 1994.

Other factors also point to accelerating economic malaise. Among these are an unemployment rate exceeding 35% on the expanded definition (which counts people too discouraged to keep looking for jobs); a sharp slide in the value of the rand; rising government debt; troubling budget and trade deficits; and recent downgrades of South Africa's sovereign debt rating by international ratings agencies. With growth in 2014 unlikely to exceed 1.4% of GDP and the annual inflation rate hovering at around 6%, the spectre of stagflation looms. This outcome will hurt the poor the most. The impact will be particularly severe for some 17m South Africans who still live in relative poverty – and have very little prospect of ever benefiting from BEE ownership deals, management posts, preferential tenders, employee training, or new small businesses.

As the country's growth, debt and unemployment figures show, South Africa is 'running out of runway'. This means it can no longer afford BEE policies that help to choke off investment, growth, and jobs. Instead, it needs a new policy direction that is in keeping with the Constitution's commitment to non-racialism and offers a much more realistic prospect of increasing opportunity and prosperity for the poor and marginalised. [Anthea Jeffery, *BEE – Helping or Hurting*?, Tafelberg, Johannesburg, 2014, pp402-405]

The constitutional requirement of non-racialism

The founding provisions of the Constitution explicitly identify 'non-racialism' as a core value of the new order in the post-apartheid period. So strong is South Africa's commitment to this principle that this clause may not be amended except by a 75% parliamentary majority.

This commitment to non-racialism is supplemented by the equality clause (Section 9), which expressly requires equality before the law; bars discrimination on racial (and other) grounds;

and requires those who nevertheless discriminate on racial grounds to prove the fairness of their conduct. As an exception to these general rules, the equality clause incorporates a sub-section authorising the taking of 'legislative and other measures designed to protect or advance persons... disadvantaged by unfair discrimination'. This clause makes no reference to race.

Another important clause (Section 195 of the Constitution) calls for a 'public administration that is broadly representative of the South African people'. However, it also makes it clear that the pursuit of broad representivity must not be allowed to trump other needs. The clause thus stresses the importance of employment practices 'based on ability, objectivity, and fairness'. It also requires the public service to ensure the 'efficient, economic and effective use of resources'.

Since this clause applies solely to the public service, there is nothing in the Constitution that requires 'broad' representivity in the private sector. On the contrary, Section 9 (the equality clause) prohibits businesses and other private persons from 'directly or indirectly' discriminating against anyone on the grounds of race. Any private person that nevertheless does so discriminate bears the onus of proving that such discrimination is fair. Moreover, though the State has the power to take 'legislative and other measures' to promote the achievement of equality, there is nothing in the Constitution that allows this to be done on the basis of race, rather than the 'disadvantage' expressly mentioned in the equality clause.

Another founding clause – which also needs a 75% majority to change – reinforces the binding force of these provisions by guaranteeing the 'supremacy of the Constitution' and adding: 'The Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.'

By contrast, the Constitution makes no mention of racial targets, black economic empowerment, or the ruling party's goal of demographic representivity in every sphere. Instead, the Constitution stands firm in its endorsement of non-racialism and equality before the law. Where it authorises affirmative action, it does so for the specific purposes of 'protecting or advancing' the unfairly disadvantaged, or making the public service more 'broadly representative' (provided this is not at the expense of ability, fairness, effectiveness, and efficiency). The Constitution also makes it clear that these affirmative action provisions are exceptions to its general principles of non-racialism and equality before the law. Hence, like all derogations from general rule, these exceptions must be interpreted narrowly, so as to limit the extent to which they detract from the wider principles in issue.

Yet the current system of BEE – as well as the further changes now proposed in Part 2 of the revised codes – require an extensive system of racial classification. However, since 1991, when the National Party government repealed the Population Registration Act of 1950, there has been no statutory foundation on which South Africans can be classified into the apartheid-era categories of 'white', 'African', 'Indian', or 'coloured'. Moreover, BEE requires not only racial classification but also a racial differentiation in the treatment of South

Africans, once they have been classified into these racial categories. However, racial classification and racial differentiation contradict the Constitution's emphasis on non-racialism. Measures with a racial focus of this kind also fall outside the ambit of the affirmative action measures sanctioned by Section 9(2) of the equality clause.

These core constitutional considerations are sufficient in themselves to require a shift from BEE – with its emphasis on race – to a different and more effective form of affirmative action. The latter, as more fully explained below, may be summarised as 'economic empowerment for the disadvantaged', or 'EED'. Moreover, apart from the constitutional barriers to race-based measures, there are many other reasons for making the shift from BEE to EED.

A shift from BEE to EED

Much of the persistent racial inequality in South Africa has its roots in social factors which the Government's BEE policies cannot begin to address and often make worse.

The relevant problems in South Africa are broadly similar to those in the United States, where affirmative action has been in place for some 50 years but has done little to assist the truly disadvantaged among African-Americans. In the US, however, there has at least been a long-standing and significant debate as to whether racial targets and set-asides are an appropriate remedy for these deep-rooted social problems.

An important contribution to this debate has come from Professor Dinesh D'Souza in his book *The End of Racism*, published in 1995. Here, Professor D'Souza identifies the barriers to black advancement in the US as including:

- the collapse of family life, leading to single parenthood and absent fathers;
- high rates of crime;
- widespread alcohol and drug abuse;
- a 'street' culture that celebrates violence and challenges authority;
- bad public schools and often uncaring teachers;
- a reliance on welfare and a more general dependence on government;
- debilitating perceptions of victimhood and entitlement; and
- a mistaken reliance on affirmative action measures, which generally benefit a relative elite while bypassing the poor.

Professor D'Souza's list is clearly relevant to South Africa as well. This means that policy makers here need to start boldly confronting the problems of the black underclass at their roots, rather than continuing to rely on a flawed and ineffective system of BEE.

In the US, the debate about the salience of these social factors is vigorous and is beginning to result in some policy shifts. As a result, a movement against race-based affirmative action has gained significant momentum over the past 20 years. The process began in the mid-1990s, when Ward Connerly, an African-American member of the University of California's board of regents, urged the university to abolish racially-based admissions criteria and put more emphasis on the socio-economic circumstances of applicants. Mr Connerly also pushed for the state of California to abandon race-based preferences in public employment, contracting, and state university admissions. In 1995, Proposition 209 – a measure to amend the state constitution along these lines – was endorsed by a 55% majority of the state's voters. [Wikipedia, Ward Connerly] Since then, seven other states have banned race-based affirmative action, while four additional ones are considering bans too. [*The New York Times* 17 June 2014]

Various other commentators are now also urging a shift away from race-based affirmative action towards interventions that will be more effective in benefiting the truly disadvantaged. One of these is Sheryll Cashin, author of *Place, Not Race*, who argues that 'race-based affirmative action is a blunt instrument that doesn't help the vast majority of black and Latino kids'. Such children frequently come from impoverished neighbourhoods with bad schools, while black children, in particular, often grow up without two parents in their home. Race-based affirmative action fails to take account of such considerations. Hence, affirmative action should instead be based on socio-economic factors such as income, neighbourhood, and family structure, which have the further advantage of being race-neutral. [*New York Times* 17 June 2014]

In South Africa, however, current empowerment policies remain primarily aimed at those people who are identified as 'black', whether on the basis of self-classification or in some other (unexplained) manner. Yet the poor have generally been harmed rather than helped by these policies, which have worked primarily for the benefit of a relative elite within the disadvantaged black majority. Moreover, as this elite has moved up the economic ladder, so race has become an increasingly unreliable predictor of disadvantage. Yet BEE policies largely overlook this reality. This allows the relative elite to continue garnering the benefit of race-based preferences, even as the poor are left further and further behind.

BEE thus needs to be transformed into 'EED' or 'Economic Empowerment for the Disadvantaged'. EED differs from BEE in two key ways. First, it is not race-based, but uses income and other indicators of socio-economic disadvantage as the foundation for its interventions. This allows racial classification and racial preferences to fall away, instead of becoming permanent features of policy. This in turn will reduce racial awareness and potential racial polarisation, helping South Africa to uphold the principle of 'non-racialism' embedded in the Constitution.

Second, EED focuses not on BEE outputs in the form of numerical quotas, but rather on providing the inputs necessary to empower poor people. These include decent schooling, opportunities for tertiary training on the sound foundation thus laid, a realistic chance of jobs and income, and the entrepreneurial skills and other inputs needed for success in business.

Given widespread inefficiency, wastefulness and corruption within the public service and many public institutions, a host of other reforms should also follow. To increase the quality of education, for example, public schools – some 80% of which are largely dysfunctional – should be sold off to civil society organisations or private firms that would have to compete on price and quality for the custom of parents armed with education vouchers provided by the State. Such vouchers would be funded from tax revenues and would be roughly equal to what the Government now spends on every pupil at a public school (roughly R12 000 a year). Financially empowered parents would have the capacity to ensure that principals and teachers are appointed on merit and assessed on performance, that the relevant curriculum is completed each year, and that discipline is maintained.

A similar approach could apply to the country's floundering public hospitals and clinics. These too could be privatised and encouraged to compete for the health vouchers provided to all households from tax revenues collected by the State. Membership of private medical aids would become affordable to many more, while competition for new customers, together with effective steps to increase the supply of health practitioners and reduce the regulatory burden, would help to hold down medical inflation and raise the quality of the services provided.

State-owned enterprises, most of them inefficient and a continuing drain on the public purse, should be sold off to the private sector, accompanied by measures to guard against new monopolies and promote competition. This would unleash the creativity and dynamism of business in overcoming the electricity crisis, expanding essential infrastructure, and maintaining resources already built up.

A host of municipal functions could also be outsourced to the private sector. This should be done under a competitive and transparent tendering system that would be kept free of corruption and other abuses of power by ending the culture of impunity and punishing transgressors. Functions assumed by business in this way could range from maintaining roads and filling in potholes to fixing traffic lights and bringing chaotic billing systems into order. Rates and other revenue would continue to be redistributed in large measure to historically disadvantaged areas, but monies would be better spent – with far more bang for every buck.

Instead of race-based BEE equity deals, which largely benefit a small black elite with close ties to the ruling party, all employees should be given the opportunity to take part in employee share ownership programmes. This would give all staff tangible reasons to raise productivity, reduce absenteeism, and boost the economic performance of firms. It would help tie pay increases to productivity gains and improve the 'co-operation in labour-employer relations', for which South Africa ranks last among 148 countries in the World Economic Forum's most recent global competitiveness report. Says labour expert Tony Healy: 'It would begin to win the hearts and minds of employees . . . and create wealth' for them as well. [*Financial Mail* 20 June 2014]

All other aspects of BEE, as set out in the generic codes, should be scrapped. Preferential procurement makes for corruption and waste and needs to be stopped, as ANC secretary general Gwede Mantashe stated in 2012. In the same year, Mr Mantashe also urged BEE companies to 'stop using the State as their cash cow by providing poor quality goods at inflated prices', which are sometimes four times higher than the private sector would pay.

However, this is unlikely to occur while preferential procurement policies remain in place. Other BEE requirements also place too heavy a burden on South Africa's fragile economy to merit their continuation; especially when they bring so little benefit to the truly disadvantaged.

Freed from the leg-iron of BEE, the private sector could begin to concentrate again on its core business. The black entrepreneurship so long stifled by apartheid would then no longer be undermined by the culture of entitlement that BEE has fostered. Black South Africans would also be freed from a system that makes them increasingly dependent on the Government – and which often disregards and diminishes black achievement in its narrow focus on monitoring and measuring the BEE contributions made by whites. [Anthea Jeffery, *Chasing the Rainbow: South Africa's Move from Mandela to Zuma*, IRR, Johannesburg, 2010, p170]

A new dynamism would then enter the economy. With the heavy hand of the State removed, the BEE burden removed, labour regulation substantially reformed, and the infrastructure backlog diminishing, direct investment would begin to soar. Business and entrepreneurship would thrive, and jobs would rapidly expand. The skills of all South Africans would be used to the full, while new skills would soon be generated to help meet growing demand. With demand for labour rising, wages would go up as well – not because of government fiat or violent strikes but in response to market forces.

With economic freedom expanding in this way, South Africa could swiftly join the ranks of the most free countries – nations where annual average GDP per head stands at some US $38 000 or R420 000 and even the poorest 10% of people have annual average GDP per head of around US $12 000 or close on R135 000. The average rate of economic growth could also rise to the key figure of 7% of GDP a year. As former Reserve Bank governor Gill Marcus has pointed out: 'With growth of 7% a year, you double your income every ten years.' A rising tide of this magnitude would swiftly lift all boats. Nothing could do more to overcome past wrongs and build prosperity for all.

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