



## BLACK BUSINESS COUNCIL

### BLACK BUSINESS COUNCIL SUBMISSION TO PARLIAMENT THE RECOMMENDATION TO THE DTI'S BROAD BASED BLACK ECONOMIC EMPOWERMENT AMENDMENT BILL, 2011

1<sup>st</sup> March 2013

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Parliament

The Black Business Council (BBC) welcomes the invitation to submit its recommendations to the Honourable members of Parliament relating to the BBBEE Amendment Bill (*As introduced in the National Assembly (proposed section 75); explanatory summary of Bill published in Government Gazette No. 35907 of 23 November 2012*)

. This opportunity provides citizens with a golden opportunity to comply with the Constitution of the Republic of South Africa (RSA) in particular the Bill of Rights Chapter 2 section 9(2) which states thus "Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons or categories of persons, disadvantaged by unfair discrimination may be taken"

The BBC further submits that prioritising the development and advancement of black people is indeed fair discrimination and meets the constitutional requirements as enshrined in section 9(2) above and section 9(5).

We therefore call upon the Honourable members of Parliament to display an unambiguous and courageous political will to level the playing as enjoined by the Constitution of RSA to do so and in keeping with the objects of the Bill in particular sub-section 3.2 which states thus "The proposed legislative amendments seek to give effect to Government's policy aimed at the reduction of inequality, defeating poverty and the creation of employment on a larger scale through the New Growth Path founded on the restructuring of the South African economy".

Below are our inputs to the amendments:

*The BBC presents a number of proposals for serious consideration and these are outlined below:*

***Trumping Provision - which is conspicuous by its absence in the amendments?***

***The BBC strongly recommends that, if any conflict relating to the matters dealt with in this Act arises between this Act and the provisions of any other law save the Constitution and/or any Act expressly amending this Act, the provisions of this Act MUST prevail.*** (This is consistent with many other Acts passed by Parliament.

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## Amendment of section 1 of Act 53 of 2003

1 (a) by the insertion before the definition of "black people" of the following definition:

“**B-BBEE transaction**” means any transaction, practice, scheme or other initiative which affects, or may affect, the B-BBEE compliance of any person.”

(b) by the substitution for the definition of "black people" of the following definition:

“**Black People**” [is a generic term which] means Africans, Coloureds, and Indians who are citizens of the Republic of South Africa by birth or descent or who became citizens of the Republic of South Africa by naturalisation -

- a. before 27 April 1994; or
- b. on or after 27 April 1994 and who would have been entitled to acquire citizenship by naturalisation prior to that date but were precluded from doing so by Apartheid policies;”;

### ***Our Recommendations:***

*The definition of "black people" as amended is supported as the amendment aligns with other related legislation.*

(c) by the substitution for the definition of “**broad based black economic empowerment**” of the following definition:

“**broad based black economic empowerment**” means the sustainable economic empowerment of all black people, in particular **(Black)** women, **(Black)** workers, **(Black)** youth, **(Black)** people with disabilities and **(Black)** people living in rural areas, through diverse but integrated socio-economic strategies that include, but are not limited to:-

- (a) increasing the number of black people that manage, own and control enterprises and productive assets;



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- (b) facilitating ownership and management of enterprises and productive assets by communities, workers, cooperatives and other collective enterprises;
- (c) human resource and skills development;
- (d) achieving equitable representation in all occupational categories and levels in the workforce;
- (e) preferential procurement, including the promotion of local content procurement; and
- (f) investment in enterprises that are owned or managed by black people;”

### **Our Recommendations:**

*In order to avoid ambiguity and creation of loopholes that may defeat the purpose of this Act , we propose that under (c) Add the word “Black” after in particular before women and before all other categories and add professionals after workers so that it reads in particular **black** women, **black** workers, **black** professionals, **black** youth. **Black** people with disabilities and **black** people living in rural areas.*

*We also propose that an additional category (g) be added, and (g) reads promoting black professionals*

- (d) by the insertion of the following definitions before the definition of “**Council**”

“**B-BBEE Verification Professional**” means a person registered by the verification agency regulator and/or the South African National Accreditation System to conduct B-BBEE verification;

1. The dti allows both SANAS and IRBA to accredit entities that can do verification. In their definition of BBBEE Verification Professional and Verification Regulator they only make reference to SANAS and not any other agency. It is our view that they should leave it open for the Minister to declare any other agency as a Regulator in the future because currently the Bill only confines this function to SANAS. This has proven to be problematic in the past so I would suggest they revert to their wording in the originally published Bill which gives them the ability to in future choose any other body to do such accreditation. I suggest that they therefore use the following two definitions:



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""B-BBEE Verification Professional" means a person registered by the verification agency regulator and/or the South African National Accreditation System to conduct B-BBEE verification;

""Verification Professional Regulator" means the Independent Regulatory Board of Auditors, a statutory body established in terms of section 3 of the Auditing Profession Act, 2005 (Act No 26 of 2005)" or any other body that the Minister may from time to time appoint as such.

2. The biggest flaw in the old Act was section 10 which allowed state organs to apply the Codes "as far as is reasonably possible". This should read that they "must" in order to ensure consistency in approach throughout the economy. Government departments should not be given the option of complying or not. This also supports the trumping provision that we have requested in our submission.

"Codes" means the codes of good practice issued by the Minister in terms of Section 9 of the Act;

"Commission" means the B-BBEE Commission established in terms of section 15 of the Act;";

*We support the amendment, however we also like to add that these verification agencies must themselves be vetted to comply as meeting the BEE threshold and must be black majority owned*

- *We are supportive of these amendments.*

(e) by the insertion of the following definitions after the definition of "Council":

"Department" means the Department of Trade and Industry;

### ***Our Recommendations:***

- *The definition including "Department" is accepted*

"Fronting B-BBEE Practice" means a transaction, arrangement or conduct that directly or indirectly undermines or frustrates the achievement of the objectives of this Act or



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the implementation of any of the provisions of this Act, including but not limited to practices in connection with a B-BBEE transaction –

- (a) in terms of which black persons who are appointed to an enterprise are discouraged or inhibited from substantially participating in the core activities of that enterprise;
- (b) in terms of which the economic benefits received as a result of the B-BBEE status of an enterprise do not flow to black people in the ratio specified in the relevant legal documentation;
- (c) involving the conclusion of a legal relationship with a black person for the purpose of that enterprise achieving a certain level of B-BBEE compliance without granting that black person the economic benefits that would reasonably be expected to be associated with the status or position held by that black person;
- (d) involving the conclusion of an agreement with another enterprise in order to achieve and enhance B-BBEE status in circumstances in which –
  - (i) there are significant limitations on the identity of suppliers, service providers, clients or customers;
  - (ii) the maintenance of business operations in a context reasonably considered to be improbable having regard to resources;
  - (iii) the terms and conditions were not negotiated at arm's length on a fair and reasonable basis;

***Our Recommendations:***

***We do not believe the word Fronting is appropriate because fronting is FRAUD and must be classified as misrepresentation as fronting is not far reaching for such offenses.***

***We propose that the threshold for companies included for this purpose should commence from a turnover of R5 million, this is to make sure that companies should not break up their businesses to avoid scrutiny.***



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*Furthermore, we recommend that imprisonment be for a minimum period of 24 months, plus a fine of 10% of the company's turnover.*

“Local Content” means locally produced goods, services or works or locally manufactured goods which satisfy a stipulated minimum threshold for local production and content”;

### ***Our Recommendations:***

***We propose that local content be qualified: BEE compliant local content and this provision should also be aligned within the Codes of Good Practice***

(f) by the insertion of the following definition after the definition of “this Act”:

““Verification Professional Regulator” means the Independent Regulatory Board of Auditors, a statutory body established in terms of section 3 of the Auditing Profession Act, 2005 (Act No 26 of 2005).”

### ***Our Recommendations:***

- *We propose that SANAS role be terminated totally and be replaced by the Independent Regulatory Board of Auditors, if this is what the amendment entails, we fully support that amendment as we have always maintained that SANAS does not possess sufficient depth as far as BEE verification is concerned*

### **Amendment of section 2 of Act 53 of 2003**

2. Section 2 of the Principal Act is hereby amended: -

(a) by the substitution for paragraph (g) of the following paragraph:

“(g) promoting access to finance for black **[economic empowerment]** start-ups, micro and medium enterprises and black entrepreneurs, including in the informal black business sector”.



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### ***Our inputs:***

*We recommend that the word “small” be inserted between start-ups and micro so that it is consistent with word SMME*

- (2) Subject to section 12A, an enterprise in a sector in respect of which the Minister has issued a sector code in terms of section 9 may only be measured for compliance with the requirements of broad based-black economic empowerment in accordance with that code.
- (3) Enterprises operating in a sector in respect of which the Minister has issued a sector code in terms of section 9, must report annually on their compliance with B-BBEE to the Sector Council.”

### **Amendment of Section 11 of Act 53 of 2003**

6. Section 11 of the Principal Act is hereby amended by the substitution for subsection (2) of the following subsection:–

- “(2) A strategy in terms of this section must –
- (a) provide for an integrated, co-ordinated and uniform approach to black economic empowerment by all organs of state, public entities, the private sector, non-governmental organisations, local communities and other stakeholders;
  - (b) develop a plan for financing broad-based black economic empowerment, including the creation of incentive schemes to support effective black owned and managed enterprises;
  - (c) provide a system for organs of state, public entities and other enterprise to prepare broad-based black economic empowerment plans and to report on compliance with those plans; and
  - (d) be consistent with this Act.”



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Insertion of section 12A in Act 53 of 2003

7. The following section is hereby inserted in the principal Act after section 12:–

### **”12A Transformation policy”**

- (1) If requested to do so, the Minister may permit organs of state or public entities to determine their own transformation policies, if the Minister is satisfied that this will advance the objectives of B-BBEE and the strategic imperatives in the South African economy.
- (2) An organ of state or a public entity must apply any transformation policy made in terms of this section as if it were a Code.
- (3) In the event of any conflict between a Code issued in terms of section 9 and a transformation policy made in terms of this section, the transformation policy prevails.”

### ***Our Inputs:***

*We support these amendments, and support the view that when the charters exceeds the Codes than such Charter shall prevail*

### **15 Establishment and status of B-BBEE Commission**

- (1) The B-BBEE Commission is hereby established as a juristic person to function as an organ of state within the public administration, but as an institution outside the public service.
- (2) The Commission is headed by a Commissioner appointed by the Minister.
- (3) The Commission -
  - (a) has jurisdiction throughout the Republic;
  - (b) is independent, and subject only to –
    - (i) the Constitution and the law; and
    - (ii) any policy statement, directive or request issued to it by the Minister in terms of this Act;
  - (c) must be impartial and perform its functions without fear, favour, or prejudice; and
  - (d) must exercise the functions assigned to it in terms of this Act or any other law, or by the Minister, in-
    - (i) the most cost-effective and efficient manner; and



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- (ii) in accordance with the values and principles mentioned in section 195 of the Constitution.
- (4) Each organ of state must assist the Commission to maintain its independence and impartiality, and to exercise its authority and perform its functions effectively.

### ***Our Inputs***

*We recommend that the powers of the B-BBEE Commission should be similar to those of the Competition Commission, if not stronger.*

### **16 Appointment of Commissioner**

- (1) The Minister must appoint a person with suitable qualifications and experience to be the Commissioner for a term of five years.
- (2) The Minister may re-appoint a person as Commissioner at the expiry of that person's office.
- (3) The Commissioner, who is the Chief Executive Officer of the Commission, is responsible for the general administration of the Commission and for carrying out any functions assigned to it in terms of this Act, and must –
  - (a) perform the functions that are conferred on the Commissioner by or in terms of this Act;
  - (b) manage and direct the activities of the Commission; and
  - (c) supervise the Commission's staff.
- (4) The Minister must, in consultation with the Minister of Finance, determine the Commissioner's remuneration, allowances, benefits, and other terms and conditions of employment.
- (5) The Commissioner, on one month's written notice addressed to the Minister, may resign as Commissioner.
- (6) The Minister may remove the Commissioner from office for –
  - (a) serious misconduct or permanent incapacity;



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- (b) engaging in any activity that may undermine the integrity of the Commission;
- (c) any other ground that justifies the removal of the Commissioner.

### ***Our inputs***

- *We support the amendments.*

### **17 Functions of B-BBEE Commission:**

(1) The functions of the Commission are –

- (a) to oversee, supervise and promote adherence with this Act in the interest of the public;
- (b) to strengthen and foster collaboration between the public and private sector in order to promote and safeguard the objectives of B-BBEE;
- (c) to receive and investigate complaints relating to B-BBEE in accordance with the provisions of this Act;
- (d) to promote advocacy, access to opportunities, and educational programmes and initiatives of B-BBEE;
- (e) to maintain a registry of major B-BBEE transactions, above a threshold determined by the Minister from time to time;
- (f) to receive and analyse reports as prescribed concerning B-BBEE compliance from organs of state, public entities and private sector enterprises;
- (g) to promote good governance and accountability by creating an effective and efficient environment for the promotion and implementation of B-BBEE; and



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(h) subject to this Act, to exercise such other powers as may be conferred on the Commission in writing by the Minister.

### ***Our inputs***

*We propose that an additional sub clause be added that an annual report be published to track progress and the Minister should ensure remedial action is taken*

### **18 Investigation by Commission**

- (1) Subject to the provisions of this Act, the Commission has the power, on its own initiative or on receipt of a complaint in the prescribed form, to investigate any B-BBEE transaction which exceeds a value determined from time to time by the Minister.
- (2) The Commission may not investigate any matter that constitutes an administrative action, as defined in the Promotion of Administrative Justice Act, 2000 (Act No 3 of 2000) or may be reviewed on any ground permissible in law.
- (3) The format and the procedure to be followed in conducting any investigation must be determined by the Commission with due regard to the circumstances of each case and may include the holding of a formal inquiry.
- (4) For the purposes of conducting an investigation, the Commission may exercise the powers conferred upon the Companies and Intellectual Property Commission by sections 176 to 179 of the Companies Act, 2008 (Act No 71 of 2008) read with the changes required by the context.
- (5) Without limiting the jurisdiction of the Commission, the Commission may make a finding as to whether any B-BBEE transaction involves fronting practices.



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- (6) The Commission may institute proceedings in a court to restrain the commission of any breach of this Act, including any fronting B-BBEE practice, or to obtain appropriate remedial relief.
- (7) If the Commission is of the view that any matter it has investigated may involve the commission of a criminal offence, it must refer the matter to the National Prosecuting Authority or an appropriate division of the South African Police Services.
- (8) The Commission may refer to –
- (a) the South African Revenue Service, any concerns regarding behaviour or conduct that may be prohibited or regulated in terms of legislation within the jurisdiction of that Service;
  - (b) the Independent Regulatory Board for Auditors, any concerns regarding behavior or conduct by a B-BBEE Verification Professional; or
  - (c) any other regulatory authority, any concerns regarding behavior or conduct that may be prohibited or regulated in terms of legislation within the jurisdiction of that regulatory authority.

### **20 Offences and Penalties**

- (1) A person is guilty of an offence if that person knowingly -
- (a) misrepresents or attempts to misrepresent the B-BBEE status of an enterprise;
  - (b) provides false information or misrepresents information to the Verification Personnel in order to secure a particular B-BBEE status or any benefit associated with the compliance with this Act;



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- (c) provides false information or misrepresents information relevant to assessing the B-BBEE status of an enterprise, to any organ of state or public entity.
- (2) A B-BBEE Verification Professional or any procurement officer or other official of an organ of state or public entity who becomes aware of the commission of, or any attempt to commit, any offence in terms of sub-section (1) and fails to report it to an appropriate law enforcement agency, is guilty of an offence.
- (3) Any person convicted of an offence in terms of this Act, is liable:-
- (a) in case of a contravention of sub-section (1), to a fine or to imprisonment for a period not exceeding 10 years or to both a fine and imprisonment; or
  - (b) in any other case to a fine or to imprisonment for a period not exceeding 12 months or to both a fine and imprisonment;
  - (c) in the case of an enterprise, to a fine of 10% of that enterprise's annual turnover.
- (4) In addition, any person and/or entity convicted of an offence under subsections (1) or (3) of section 20, shall be banned from contracting or transacting any business with any organ of state and/or public entity, and shall be entered into the National Treasury register of tender defaulters.

### ***Our inputs:***

*We support the 10% fine, and this should be strictly applied, and avoid using the 10% as the maximum but make it instructive. This should act as a deterrent and the Competition Commission is an example of this provision*

### **21 Monitoring, Evaluation, and Reporting**

- (1) All spheres of government, public entities, and organs of state must report on their compliance with B-BBEE in their audited annual financial statements and annual reports under the Public Finance Management Act, 1999 (Act No. 1 of 1999).



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(2) All public companies listed on the Johannesburg Stock Exchange must provide to the Commission –

### ***Our inputs***

*We propose the inclusion of companies with a minimum threshold of R5 million to avoid companies breaking their companies into smaller entities*

### **22 B-BBEE Verification Professional Regulator**

The B-BBEE verification professional shall be regulated by the B-BBEE verification agency regulator established in the Audit Profession Act, 2005 (Act No. 26 of 2005) as amended from time to time.

### ***Our Inputs***

*We support the amendments*

Additional Recommendations not covered in the amendments

1. At the outset, we would like to point out that the BBC is opposed to the interpretation of the BBEE Act that creates an incorrect understanding that Sector Codes are a creation of the Act.
2. Contrary to popular belief, the BBEE Act does not in fact provide for Sector Codes. There has been a generous and questionable interpretation of section 9(1) of the principal Act that provides for the Minister, by notice in the government gazette, to issue codes of good practice on BEE to also mean Sector Codes. This is simply incorrect and not supported by any clause in the law. NB! **The term Sector Code does NOT appear anywhere in the BBEE Act of 2003.**
3. Prior to the gazetting of the CoGP and notwithstanding the BBC view about the legality of the Sector Codes in the 1<sup>st</sup> place, Gvt had issued a circular advising all the stakeholders that those that wished to have their Sector Codes gazetted should do so by a particular date which was before the gazetting of the Codes of Good Practice but was later extended to August 2008.
4. For starters, all those that still seek to have their sector codes gazetted into law but have missed the Extended August 2008 deadline are in fact acting outside the provisions of the Transitional Period and are therefore bound by the Generic Codes of Good Practice.
5. The CoGP, as envisaged in terms of section 9(1) of the BBEE Act of 2003, have already been issued through notice 112 of 2007 and thus the law has been complied with.

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6. The primary purpose of the CoGP was to harmonise the implementation BBBEE so that a common baseline could be used to avoid comparing apples to pears during the assessment of compliance.
7. The Sector codes are analogous to a “gentlemen’s agreement” with Ministerial endorsement. As such, they should at the very least meet the standards set in the generic CoGP, and at the best they should exceed the minimum requirements of such CoGP. Both conditions militate against the extra effort to initiate the Sector Code. Furthermore any amendment of the CoGP will have a consequential effect that would require amendments of sector codes and thus creating more confusion and uncertainty.
8. The Transformational Charters are by contrast specifically referred to in section 12 of the BEE Act. These were the initial Gvt initiatives to get industry buy in and to get some learnings on the eventual template of BBBEE.
9. By their very nature, the Sector Codes are reformational and amount to window-dressing in that they seek to legitimize current untransformed practices by simply providing new “BEE” labels to such practices. All the sectors with gazetted sector codes are today no better transformed than the sectors without sector codes, in certain instances transformation is actually reversed.
10. Notice 1106 of 2010 issued by the Department of Trade and Industry and inviting comments from the public on Phase 1 of the Draft Code refers to Section 9(5) of the BBBEE Act as the legal basis upon which the “draft code” was issued. We submit that there is no reference to “Sector Code (s)” in section 9(5), so the reference by various experts and sometimes by gvt officials is infact incorrect.
11. Section 9(5) of the BBBEE Act ONLY empowers the minister to enable the issuing, replacing or amending a CoGP in terms of section 9(1) i.e. the generic CoGp.
12. The BBC would thus argue very strongly that the non-reference to “Sector Codes” in section 9(5) reduces the foundation of the Sector Codes to the spirit rather than the letter of the law and therefore at all times “Sector Codes” (where such exist) must equal or exceed all the minimum requirements of the generic CoGP.
13. A mechanism such as Sector Code, has unintended consequence to evade compliance with CoGP.



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14. Notwithstanding the moderate targets set in the 2007 Generic CoGP, various base line research studies have been consistent in indicating poor levels of compliance. To now bring another instrument with more conservative targets would make mockery of transformation and thus such moves should be avoided.
15. Government through its tools like National Treasury Regulations and Practice Notes should enforce the requirement for doing business with transformed companies.

### **Major Objection to the Sector Charters**

16. The mere existence of the Sector Charters/Codes undermines a fundamental principle enshrined in the CoGP which states that “Substance takes precedence over legal form”. The motivation for the Sector Codes/Charters rely on the differences in the various industry sectors and thus on the argument that one size fits all as alleged about the CoGP is not desirable. The truth though is that this allegation is without basis because the correct application of the “Substance takes precedence over legal form” principle actually makes the CoGP universal. On the contrary the Sector Charters/Codes are actually rigid and force companies to perform at industry level norms which companies are not always geared for, resulting in the poor compliance to BBBEE.
17. Sector Charters/Codes seem to promote collusion, in that the industry discussion requires competitors meetings to agree on a whole range of variables which sometimes create barriers for entry by new players.
18. Sector Charters/Codes stifle innovation in that companies cannot play to their individual strengths but have to succumb to industry norms.
19. Sector Charters/Codes lower standards in that for an industry standard to be agreed it becomes natural to opt for the lowest common denominator.
20. Sector Charters/Codes increase the costs of doing business in that the Supply Chain Management must be geared to accommodate the numerous different standards of the various Sector Charter/Codes because each supplier brings a different standard to be measured by.
21. Sector Charters/Codes creates unnecessary uncertainties in that stakeholders are forced to await the final outcome of often protracted negotiations which are still subject to DTI approval.
22. Finally, the purpose of introducing harmonising CoGP is eventually completely undermined.



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### Final Recommendations

23. All Sector Charters/ Codes in the gazetting pipeline should be scrapped with immediate effect.  
The Law must be amended to outlaw further drafting of the sector codes especially because the transition period that was provided for sector codes has long expired (August 2008).
24. The principle of 'substance takes precedence over legal form' must be workshoped extensively by the DTI.
25. Companies should seek direct compliance with the CoGP, play to their strengths and seek company specific concessions from the DTI.
26. The BBC recommends to Parliament that ALL the charter process be abandoned with immediate effect, in favour of full compliance with CoGP and enforcement of compliance by Government.

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