

Comments on the Corporate Governance Framework Generic Report on Broad-Based Black Economic Empowerment (BBBEE).

1. Introduction

- 1.1 Business Unity South Africa (BUSA) has read the CGF's draft report on BBBEE with great interest and benefit. The report presents the chronology of the evolution of BEE and captures the crucial aspects relating to the implementation of the objectives of BBBEE.
- 1.2 BUSA supports the effective implementation of BBBEE. The comments reflected below are therefore intended to help clarify the key substantive points made in the report and, where possible, to add what we believe will assist to make the points more meaningful to the reader.
- 1.3 The comments follow the same sequence that the subject matter of the draft report is presented. Underlined words are proposed for insertion into the text.

2. BEE chronology and background

- 2.1 In slide 12, the report states that “The broad-based Black [Economic] Empowerment Act has its roots within the Freedom Charter of 1955”. As this is a very important point in the evolution of BEE, it is perhaps vital to indicate, in one or two sentences, what the Freedom Charter says about this subject. Moreover, this is particularly important because the ANC has declared 2005 as the “Year of Popular Mobilisation to Advance the Vision of the Freedom Charter.”
- 2.2 The Freedom Charter does not make any reference to BEE, but refers, in one of its ten clauses, to how the country's wealth should be shared. This clause of the Charter is a direct response to the systematic dispossession and expropriation of all forms of productive wealth in the hands of blacks unleashed by colonialism and apartheid. And this is the historical basis of BBBEE and the economic challenges it is intended to address.
- 2.3 In particular, the BEE policy as we know it today is located within the ANC's overarching economic vision, viz. “the people shall share in the country's wealth.” The economic conditions that the Freedom Charter called for their eradication have not yet disappeared in our landscape. Therefore, the BEE policy gives content to the ANC's economic vision by providing a framework that facilitates the participation of black people in mainstream economic activities.
- 2.4 Again in slide 12, the report states that “Broad-based Black [Economic] Empowerment (BEE) was refined & developed further in the Reconstruction and Development Program (RDP) in 1994.” What does the RDP say about BEE? It is important to indicate, again in one or two sentences, that the RDP emphasizes, as a means to redress the economic inequalities and imbalances created by the past racial discriminatory policies and practices, the need `to deracialise business ownership and control completely, through focused programmes of Black Economic Empowerment.’

3. Evolution of Broad-based Black Economic Empowerment in South Africa

- 3.1 In slide 13, there are two important dates missing in the line depicting the chronology of BEE. The first important date missing is '96, the year in which the new Constitution was adopted. This is worth depicting in the line because the Constitution provides the overarching legislative framework that empowers the state to take measures to promote equality by redressing the inequalities and imbalances caused by the past racial discriminatory laws and policies. Both the Employment Equity and BEE Acts are designed to give effect to the equality clause of the Constitution.
- 3.2 The second important date missing is (again in slide 13) '04, the year in which the DTI released for public comment the Codes of Good Practice on BBBEE.

4. Objectives

- 4.1 To make it easy for the reader who may want to further explore and interpret the objectives of the BEE Act, it may be wise to state in slide 15 the specific clause of the Act that spells out the objectives.
- 4.2 The Codes of Good Practice's definition of black people limits it 'black South Africans who are citizens by birth or who obtained citizenship prior to 27 April 1994'.
- 4.3 As this definition of black people is inconsistent with the one provided in section 1 of the BEE Act, the DTI will probably consider amending the Act to ensure that there is uniformity in the meaning attached to the concept [i.e. 'black people'].
- 4.4 In slide 20, the report states, "Through the BEE Act, the Minister of Trade and Industry is empowered to **develop various business sector charters...**" As nothing in the BEE legislation empowers the Minister to develop various business sector charters, we suggest that the bolded part of the sentence is substituted with the following: gazette various sector charters as either BEE Sector Transformation Charter (in terms of section of the Act) or Codes of Good Practice (in terms of section of the Act).
- 4.5 It may be wise to indicate that only those charters developed by all the relevant stakeholders in the sector and which advance the objectives of BBBEE will be eligible for gazetting by the Minister.
- 4.6 Again in slide 20, the report states that "The Codes of Good Practice are intended to **react to the changing needs**" We suggest that the bolded part of the sentence is replaced with the following: "give guidelines and principles regarding the implementation "

5. Codes vs. Charters

- 5.1 In slide 22, we need to say more about the distinction between the Codes and Charters. In particular, the reader must understand that the generic balanced scorecard of the Codes of Good Practice on BBBEE binds industries operating within sectors that have no gazetted charters.

- 5.2 Industries operating within sectors that have gazetted charters should understand that if there are any conflicts of principle after the charter has been gazetted, the principle contained in BBBEE legislation, Codes of Good Practice and the Strategy document shall override the principles contained in the charter.
- 5.3 In slide 23, the report states that “...Codes of Good Practice versus **industry** charters?” To avoid confusion between sector charters and enterprise charters, we suggest that you substitute the bolded word in the sentence with sector.
- 5.4 The Codes strongly urges industries that do business with the government and parastatals to develop sectors charters, and other industries to develop enterprise charters as a sign to demonstrate their commitment to the transformation ideals of the country. Enterprise charters need not be gazetted.
- 5.5 In slide 47, the report says “The Codes of Good Practice apply to ...all transformation charters, both present & future.” We need to be careful here. In the absence of a clear statement on the relationship between the Codes and the existing charters, the Codes are ambiguous on the status of the transformation charters that were concluded before the release of the Codes.
- 5.6 Moreover, the mining and petroleum charters were developed out of other acts of parliament that do not specifically refer to the BEE Act No.53 of 2003. The Mining and Petroleum Charters therefore have a legal framework established under the auspices of the Minerals and Petroleum Resources Development Act No. 28 of 2002 and the Petroleum Products Amendment Act No. 53 of 2003. On the basis of this, the stakeholders in the Mining and Petroleum industries could rightfully argue that their charters should not specifically be changed to bring them into line with the Codes.

6. **Dimensions of Transformation**

- 6.1 We think slide 24 can be deleted completely since the subject is adequately addressed in slide 35. However, should you decide to retain it, we suggest that you use the information from the Codes of Good Practice on BBBEE released in December 2004, as this is the most current information on the subject .
- 6.2 In slide 34, under the bullet point starting with “The scorecard...”, we suggest that you delete the sentence “will be issued as a Code of Good Practice that”.
- 6.3 How does the balanced scorecard work? We believe that it is important to indicate that the scorecard operates on the basis of a weighted average and the overall weighted average score (total score) that a business obtains determines the BEE rating (status) of that business undertaking.
- 6.4 In slide 36, amend to read “BEE status will be measured as a [total] score based on the BEE scorecard...”.
- 6.5 In slide 37, under outcome, amend to read “Accelerate development and future potential ... in the same occupational categories and [levels].”

6.6 At the end of slides 39 and 40, the report states that "...the Codes should be considered in respect of material matters & not only specific sections of the Code." What does the term "material matters" mean in respect of BEE? This concept needs to be unpacked and explained in order to avoid unnecessary confusion.

7. Charter Chronology & Advisory Councils

7.1 As the report deals, inter alia, with the trajectory of transformation charters, it might be enlightening to highlight that charters were first mooted by the Department of Minerals and Energy, the BEE Commission and the National Economic Development and Labour Council as strategic tools for guiding and informing the transformation of the socio-economic landscape.

7.2 When implementing a BEE preferential procurement policy, companies should realize that the draft Preferential Regulations of the National Treasury also need to be taken into consideration. We are told that the DTI is working with the National Treasury to align the Codes with the Preferential Regulations of the National Treasury.

7.3 One of the questions that often arises when talking about the transformation charters relates to the initiator of the process. That is, who should initiate the development of a charter? Our view is that business should initiate the process, in consultation with the relevant line government department, organized labour in the sector and other relevant stakeholders.

7.4 The actual development of the charter should be driven by a Steering Committee with equitable representation of all the relevant stakeholders.

7.5 In slide 51, the report states that "...when the charter's content has been ratified by government & the Minister of Trade & Industry, the DTI gazettes the charter as a Code of Good Practice applicable to the specific sector that submitted the charter."

7.6 It is essential to note that not all charters will be gazetted as Codes of Good Practice. In this regard, an important distinction must be drawn between a charter that is gazetted as BEE transformation charter (in terms of section 12 of the BEE Act No. 53 of 2003) and a charter that is gazetted as a Code of Good Practice (in terms of section 9 of the BEE Act No. 53 of 2003).

7.7 Whereas a charter that is gazetted as a BEE Transformation Charter simply demonstrates a sector's commitment to BEE and has no legal effect, a charter that is gazetted as a Code of Good Practice is legally binding.

7.8 The Petroleum and Liquid Fuels Charter was concluded in 2000, not 2002. It is the Mining Charter that was concluded in 2002. The Financial Sector Charter was concluded in 2003.

7.9 As indicated at the end of slide 52, it is indeed true that "BEE targets that are contained within the charter must be in line with the recommended targets provided in the Codes of Good Practice". However, the recommended targets are not rigid, as industries are "required to provide adequate justification if the targets set differ significantly from the targets recommended in the generic scorecard."

7.10 In slide 55, is it not advisable to indicate that the Council, in discharging its mandate, is empowered to conduct research or commission research to be conducted; request information from organs of state or private bodies; publish reports on BEE; establish sub-committees to deal with specific matters as and when necessary; co-opt experts to serve on, or advise, sub-committees and oversee the functions of the different sector Charter Councils?

8. Policy Instruments and Rating Agencies

8.1 Slide 72 talks about financial institutions to underwrite BEE. Is it perhaps not also useful to refer to the Apex Fund and the National Empowerment Fund?

8.2 A few additional comments on the Rating Agencies that you might want to consider including in your report. For the work of a Rating Agency to inspire public confidence, its methodology should demonstrate a clear understanding of and knowledge of all Codes of Good Practice, including all the seven pillars of the BBBEE scorecard.

8.3 Before any Rating Agency is accredited, it should obtain, as a sign of positive and utmost commitment to all the seven pillars of the BBBEE scorecard, a total BEE score of 65% (i.e. it must be good contributor to BBBEE).

8.4 Finally, for a Rating Agency to be held responsible for all its activities, it should be a legal enterprise or a defined part of a legal entity and should demonstrate that it has the capacity/arrangements (e.g. insurance or reserves) to cover liabilities arising from its operations.

8.5 In slide 80, you might want to include Crystal View Trading as one of the agencies that render full house, face to face rating services.

8.6 Again in slide 80, you might want to include Empowering as one of the agencies that use databases to continuously update the preferential procurement component of an organisation's balanced scorecard.

8.7 Finally, while it is important to deal with perceived obstacles, we think it is equally important to examine real obstacles to BEE implementation.

9. Conclusion

9.1 BUSA is pleased to have been part of the panel that commented on the CGF's draft report on BBBEE.

9.2 BUSA trusts that the CGF team will find the comments in this report useful in revising the project under consideration.

9.3 Should the CGF team require further clarification on the comments contained in this report, BUSA will be delighted to do so.