



**REPABOLIKI YA AFERIKA BORWA**

**REPUBLIEK VAN SUID AFRIKA**

# **BROAD-BASED BLACK ECONOMIC EMPOWERMENT ACT**

## **Section 9(1): Codes of Good Practice**

It is hereby notified that the Minister of Trade and Industry intends gazetting the following Code of Good Practice under section 9(1) of the Broad-Based Black Economic Empowerment Act 53 of 2003 in due course. This document is published for general information.

**CODE 100: MEASUREMENT OF THE OWNERSHIP ELEMENT OF BROAD-BASED BLACK  
ECONOMIC EMPOWERMENT**

**STATEMENT 100: THE GENERAL OWNERSHIP SCORECARD AND THE RECOGNITION OF  
OWNERSHIP ARISING FROM THE SALE OF EQUITY INSTRUMENTS**

Issued under section 9 of the Broad-Based Black Economic Empowerment Act of 2003

**Arrangement of this Statement**

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## 1 DEFINITIONS

In this statement, unless the context indicates otherwise, a word or expression to which a meaning has been assigned in the Act bears the same meaning, and:

1.1 **"Acceptable Valuation Standard"** means a valuation of:

1.1.1 an asset;

1.1.2 an Economic Interest;

1.1.3 an Enterprise; or

1.1.4 any other instrument or right which is relevant to measurement under this statement, undertaken in accordance with normal valuation methods that represent standard market practice;

1.2 **"BEE"** means broad-based black economic empowerment;

1.3 **"Benefit Scheme"** means a Broad-Based Ownership Scheme in which more than 50 natural persons:

1.3.1 are intended to benefit from an Economic Interest received by the scheme or by the fiduciaries of the scheme; and

1.3.2 the economic benefits paid from the Economic Interest received is not distributed but rather applied to the benefit of the scheme's Deemed Participants;

1.4 **"black aged people"** means black people who are also aged people as defined in the Aged Persons Act of 1967;

1.5 **"black designated groups"** means:

1.5.1 black workers;

1.5.2 black unemployed people;

1.5.3 black youth;

1.5.4 black aged people;

1.5.5 black people with disabilities; and

1.5.6 black people living in rural areas;

1.6 **"black people with disabilities"** means black people who also satisfy the criteria in the definition of 'persons with disabilities' set out in paragraph 5.1 of the "Code of Good

Practice on the Employment of People with Disabilities" issued in terms of section 54(1)(a) of the Employment Equity Act;

- 1.7 **"black new entrants"** means a black Participant or Participants who:
  - 1.7.1 hold a Voting Right and Economic Interest in a Measured Enterprise; and
  - 1.7.2 prior to acquiring an Equity Interest in a Measured Enterprise, have not concluded similar transactions in respect of any other Enterprise which have, in aggregate, a cumulative value of R 20,000,000.00 measured in accordance with an Acceptable Valuation Standard;
- 1.8 **"black people"** has the meaning defined in Code 000 Statement 000;
- 1.9 **"black unemployed people"** means black people who are:
  - 1.9.1 unemployed;
  - 1.9.2 not attending or are not required by law to attend an educational institution; and
  - 1.9.3 not awaiting admission to an educational institution;
- 1.10 **"black workers"** means black people who are employees occupying the occupational levels of "skilled technical and academically qualified workers, junior management, supervisors, foremen, and superintendents", "semi-skilled and discretionary decision making" and "unskilled and defined decision making" as outlined in the EEA9;
- 1.11 **"black youth"** means black persons who are youth as defined in the National Youth Commission Act of 1996;
- 1.12 **"Broad-Based Ownership Scheme"** means a collective ownership scheme constituted with the view to facilitating the participation of specified natural persons in the benefits flowing from the ownership by that scheme or by its fiduciaries of an Equity Interest in an Enterprise;
- 1.13 **"Companies Act"** means the Companies Act of 1973, as amended or substituted;
- 1.14 **"company limited by guarantee"** means a company as referred to in section 19(1)(b) of the Companies Act;
- 1.15 **"co-operative"** means a co-operative as defined in the Co-operatives Act of 2005 and includes, without limitation any of the specific types of co-operatives specified in Schedule 1 of that Act;

- 1.16 **"Deemed Current Value"** means the result of the formula in paragraph 17.6;
- 1.17 **"Deemed Participant"** means a natural person entitled to receive a:
- 1.17.1 distribution; or
- 1.17.2 benefit;
- from a Broad-Based Ownership Scheme;
- 1.18 **"Distribution Scheme"** means a Broad-Based Ownership Scheme in which more than 50 natural persons are intended to receive distributions from the scheme that are payable from the Economic Interest received by the scheme or by the fiduciaries of the scheme;
- 1.19 **"Economic Interest"** means a Participant's Claim against the Enterprise representing a return on ownership of the Enterprise, measured in accordance with the Flow-Through and Modified Flow-Through Principles. In this regard, a Participant's entitlement to receive any payment or part payment on the Participant's Claim from a Measured Enterprise that is not in the nature of a return on ownership in that Measured Enterprise, will be treated as an Economic Interest if such payment is:
- 1.19.1 not arms-length;
- 1.19.2 not market-related;
- 1.19.3 mala fide; or
- 1.19.4 without a commercial rationale; or
- 1.19.5 intended to circumvent the provisions of this statement or the objectives of the Act;
- 1.20 **"Element"** means the measurable quantitative or qualitative elements of BEE compliance specified in Code 000, Statement 000;
- 1.21 **"Employment Equity Act"** means the Employment Equity Act of 1998, as amended or substituted;
- 1.22 **"Employee Scheme"** means a Broad-Based Ownership Scheme in which a group of employees representing more than 90% of the employees of an Enterprise or 90% of the employees in a particular occupational category(ies) (as referred to in form EEA9 the Employment Equity Act) within an Enterprise. Employee Schemes may have the characteristics of Benefits Schemes or Distribution Schemes or hybrids of both;
- 1.23 **"Enterprise"** means a natural or a juristic person, or any form of Co-operative, conducting

a business, trade or profession in the Republic of South Africa;

- 1.24 **"Equity Interest"** means the entitlement of a Participant to receive an Economic Interest and to exercise a Voting Right in an Enterprise;
- 1.25 **"Exercisable Voting Right"** means a Voting Right of a Participant that is not subject to any limitation;
- 1.26 **"Measured Enterprise"** means an Enterprise subject to measurement under this statement;
- 1.27 **"Net Equity Interest"** means the result of the formula in paragraph 17.1;
- 1.28 **"Ownership Fulfilment"** means the point referred to in paragraph 5.3.1;
- 1.29 **"Participant"** means a natural person who is:
  - 1.29.1 entitled to an Economic Interest in a Measured Enterprise;
  - 1.29.2 enjoying an Exercisable Voting Right in a Measured Enterprise; and
  - 1.29.3 a Deemed Participant;
- 1.30 **"Participant's Claim"** means any claim to payment that a Participant enjoys in relation to a Measured Enterprise, including claims enjoyed through one or more other Enterprises;
- 1.31 **"Realisation Points"** means the sum of the Ownership Fulfilment point and the Net Equity Interest points, as referred to in the ownership scorecard in paragraph 5.3;
- 1.32 **"section 21 company"** means a company incorporated under section 21 of the Companies Act;
- 1.33 **"Target"** means the Targets attributed to the various criteria in the ownership scorecard in paragraph 5;
- 1.34 **"the Act"** means the Broad-Based Black Economic Empowerment Act of 2003, as amended or substituted;
- 1.35 **"the Codes"** means all Codes of Good Practice issued in terms of section 9 of the Act;
- 1.36 **"the Generic Scorecard"** means the balanced BEE scorecard included in Code 000 Statement 000;
- 1.37 **"Voting Right"** means a voting right attaching to an instrument owned by or held on behalf of a Participant, that may be exercised at a general meeting of the shareholders of a company having share capital or any similar rights in any other form of Enterprise

measured in accordance with the Flow-Through Principle or the Control Principle; and

1.38 **"Weighting"** bears the same meaning as assigned in Code 000, Statement 000.

## **2 INTERPRETATION OF THIS STATEMENT**

2.1 This statement is to be interpreted in a manner that is consistent with the objectives of the Act, and those set out in paragraph 4.

2.2 Subject to the provisions of paragraph 3.2.1 and those of paragraphs 11 to 14, terms defined in paragraph 1 that relate to companies with share capital, may be applied to other forms of:

2.2.1 juristic persons;

2.2.2 associations of persons;  
recognized by law in South Africa.

## **3 APPLICATION OF THIS STATEMENT**

3.1 This statement is to be used in the measurement of the ownership Element of broad-based black economic empowerment in respect of any Enterprise, including any company limited by guarantee or a section 21 company that is also a Broad-Based Ownership Scheme.

3.2 Notwithstanding paragraph 3.1, this statement is not to be used in the measurement of the ownership Element of broad-based black economic empowerment in respect of:

3.2.1 an Enterprise in which the entitlement of its members to an Economic Interest or a Voting Right is not comparable in nature to that of a shareholder in a company with share capital;

3.2.2 a form of Enterprise dealt with in terms of another statement in Code 100 to the exclusion of this statement; and

3.2.3 an Enterprise excluded from the provisions of this statement by the Minister, by notice in a gazette.

## **4 OBJECTIVES OF THIS STATEMENT**

The objectives of this statement are to:

4.1 specify the scorecard for the measurement of the ownership Element of broad-based

black economic empowerment;

- 4.2 define the key measurement principles associated with the ownership Element of BEE;
- 4.3 specify the specific measurement principles applicable to trusts and Broad-Based Ownership Schemes;
- 4.4 specify the principles governing the treatment of options;
- 4.5 specify the principles governing the treatment of debt instruments;
- 4.6 specify the formula for measuring Voting Rights;
- 4.7 specify the formula for measuring Economic Interest;
- 4.8 specify the approach to and formula for measurement of Realisation Points; and
- 4.9 define the approach to awarding bonus points under this statement.

## 5 OWNERSHIP SCORECARD

The following table represents the criteria and method for deriving a score for ownership in terms of this statement:

Category	Ownership criteria	Weighting points	Compliance Target
5.1	Voting rights:		
	5.1.1 Exercisable Voting Rights in the Enterprise in the hands of black people	3	25%+1 vote
	5.1.2 Exercisable Voting Rights in the Enterprise in the hands of black women	2	10%
5.2	Economic Interest:		
	5.2.1 Economic Interest in the Enterprise to which black people are entitled	4	25%
	5.2.2 Economic Interest in the	2	10%



	Enterprise to which black women are entitled		
5.2.3	Economic Interest in the Enterprise to which the following natural persons are entitled:	1	2.5%
5.2.3.1	black designated groups;		
5.2.3.2	black Deemed Participants in Distribution Schemes or Employee Schemes; or		
5.2.3.3	black Participants in Co-operatives		
5.3	Realisation points:		
5.3.1	Ownership fulfilment	1	Refer to paragraph 17
5.3.2	Net Equity Interest	7	Refer to paragraph 17
5.4	Bonus points:		
5.4.1	Involvement in the ownership of the Enterprise of:	3	Refer to paragraph 18
5.4.1.1	black new entrants;		
5.4.1.2	black Deemed Participants of Broad-Based Ownership Schemes; or		
5.4.1.3	black Participants in Co-operatives		

## **6 KEY MEASUREMENT PRINCIPLES**

- 6.1 An Enterprise may be awarded points for the participation of black people in the Economic Interest or Exercisable Voting Rights of the Enterprise, in accordance with the ownership scorecard in paragraph 5. Black people may participate in the Economic Interest or Exercisable Voting Rights of a Measured Enterprise as direct Participants or as Participants through any other form of juristic persons or association of natural persons including:
- 6.1.1 a company with shares;
  - 6.1.2 a close corporation;
  - 6.1.3 a co-operative;
  - 6.1.4 any form of juristic person recognised under South African law not excluded in paragraph 3.2;
  - 6.1.5 a partnership or other association of natural persons;
  - 6.1.6 a Broad-Based Ownership Scheme; and
  - 6.1.7 a trust.
- 6.2 In determining the level of the entitlement of black people to participate in the Economic Interest and Exercisable Voting Rights of a Measured Enterprise, the Flow-Through Principle referred to in paragraph 7 will be applied consistently, subject to:
- 6.2.1 the Modified Flow-Through Principle in paragraph 8; and
  - 6.2.2 the Control Principle in paragraph 9.
- 6.3 An Acceptable Valuation Standard must be used in tabulating a score in respect of the ownership scorecard referred to in paragraph 5, and the same valuation standard should be used consistently in any other applicable formula set out in this statement.

## **7 THE FLOW-THROUGH PRINCIPLE**

Subject to paragraphs 8 and 9, in determining the entitlement of any category of black people to participate in an Economic Interest or Exercisable Voting Right of a Measured Enterprise,

- 7.1 only those Economic Interests or Exercisable Voting Rights to which black people are entitled shall be considered;
- 7.2 if the entitlement to an Economic Interest or Exercisable Voting Right is held by a juristic

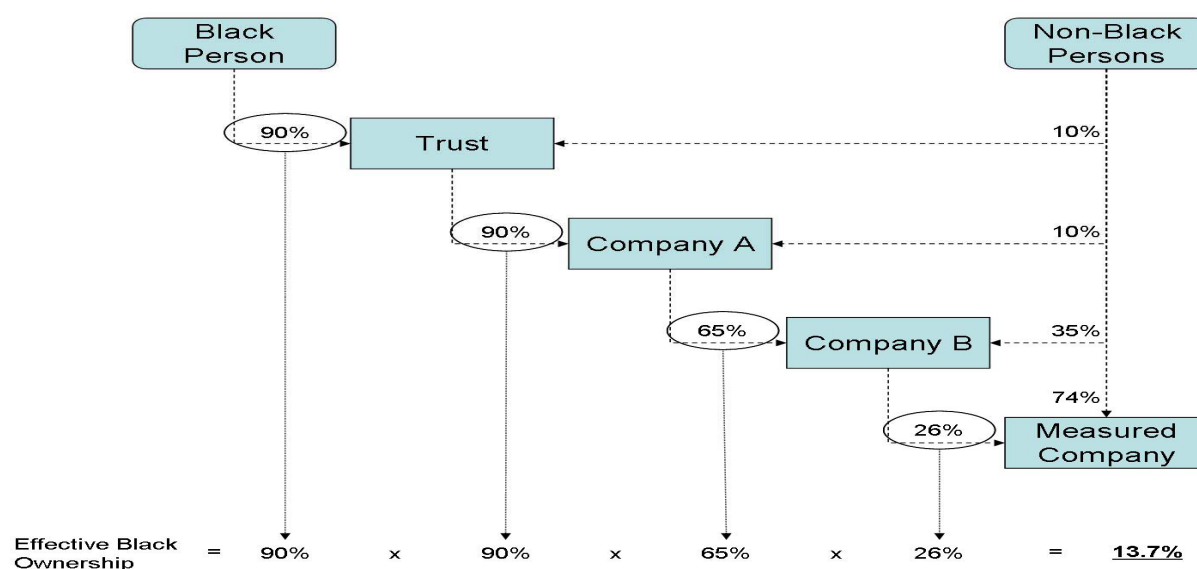
person, the Economic Interest or Exercisable Voting Right to which black people are entitled in that juristic person shall be considered;

7.3 if a black Participant has an interest in a Measured Company through one or more intervening Enterprises:

7.3.1 the percentage of the Participant's Economic Interest or Exercisable Voting Rights in the Enterprises through which the entitlements are held is multiplied by the percentage Economic Interest or Exercisable Voting Rights of each intervening Enterprise; and

7.3.2 the result of this calculation will represent the level of entitlement to Economic Interest or Exercisable Voting Rights that is used in the formulae in paragraphs 15 to 18.

7.4 The following diagram indicates the manner of calculating the effective black ownership in a measured company with four tiers of ownership using the Flow-Through Principle:



**Figure 100-1: Illustration of Flow-Through Principle:** The actual level of black ownership at each level in the ownership chain is included in the calculation of the "effective black ownership".

## 8 THE MODIFIED FLOW-THROUGH PRINCIPLE

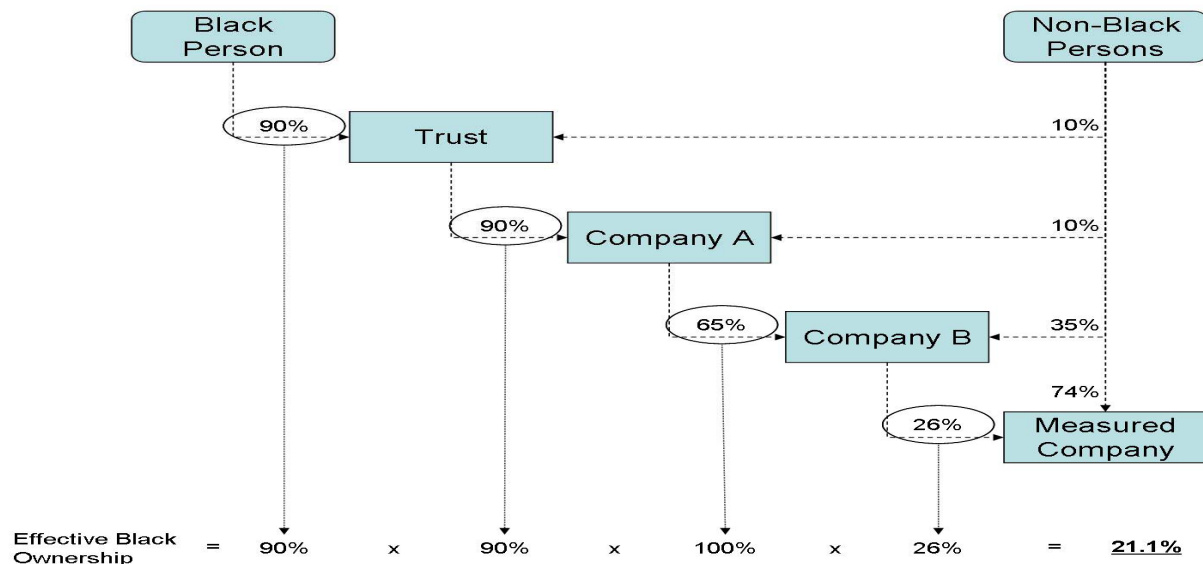
Subject to paragraphs 7, and in relation only to the measurement of Economic Interest as contemplated in paragraph 5.2.1,

8.1 If:

8.1.1 a chain of ownership exists between a Measured Enterprise and a black Participant;

and

- 8.1.2 one or more of the intervening Enterprises is a black majority owned company, then the Measured Enterprise will be entitled to treat one such black majority owned company as if it were 100% owned by black people for the purposes of any calculation of Economic Interest using the Flow-Through Principle.
- 8.2 The term "black majority owned company", in this paragraph 8, means a company having shareholding in which black Participants enjoy an entitlement to an Economic Interest that is in excess of 50% of the total entitlement to Economic Interest in that Enterprise measured using the Flow-Through Principle and specifically excludes the Measured Enterprise.
- 8.3 This principle is not applicable to the measurement of Economic Interest as contemplated in paragraphs 5.2.2 and 5.2.3.
- 8.4 The following diagram indicates the manner of calculating the effective black ownership in a measured company with four tiers of ownership using the Modified Flow-Through Principle:



**Figure 100-2: Illustration of Modified Flow-Through Principle:** The actual level of black ownership at each level in the ownership chain is included in the calculation of the "effective black ownership", with the exception of the black majority owned companies (Company A and Company B) where one of those companies is treated as if it were 100% owned by black people. Measured Enterprises are entitled to choose which black majority owned company will benefit from the

Modified Flow-Through Principle where more than one such company exists in the chain of ownership.

## **9 THE CONTROL PRINCIPLE**

Subject to paragraph 7, and in relation only to the measurement of Exercisable Voting Rights as contemplated in paragraph 5.1.1,

9.1 If:

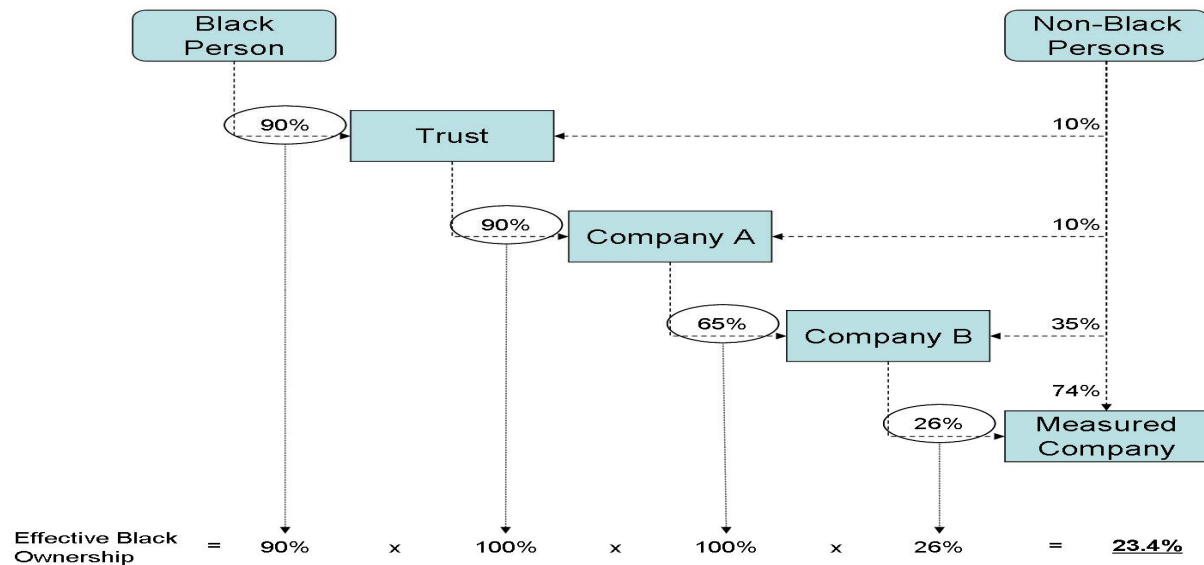
9.1.1 a chain of ownership exists between a Measured Enterprise and a black Participant;  
and

9.1.2 one or more of the intervening Enterprises is a black majority controlled company,  
the Measured Enterprise will be entitled to treat each black majority controlled company as if it were 100% owned by black people, for the purposes of any calculation undertaken in accordance with the Flow-Through Principle.

9.2 The term "black majority controlled company", in this paragraph 9, means a company having shareholding in which black Participants are entitled to Exercisable Voting Rights in excess of 50% of the total entitlement to Exercisable Voting Rights in that Enterprise measured using the Flow-Through Principle and specifically excludes the Measured Enterprise.

9.3 This principle is not applicable to the measurement of Exercisable Voting Rights as contemplated in paragraph 5.1.2.

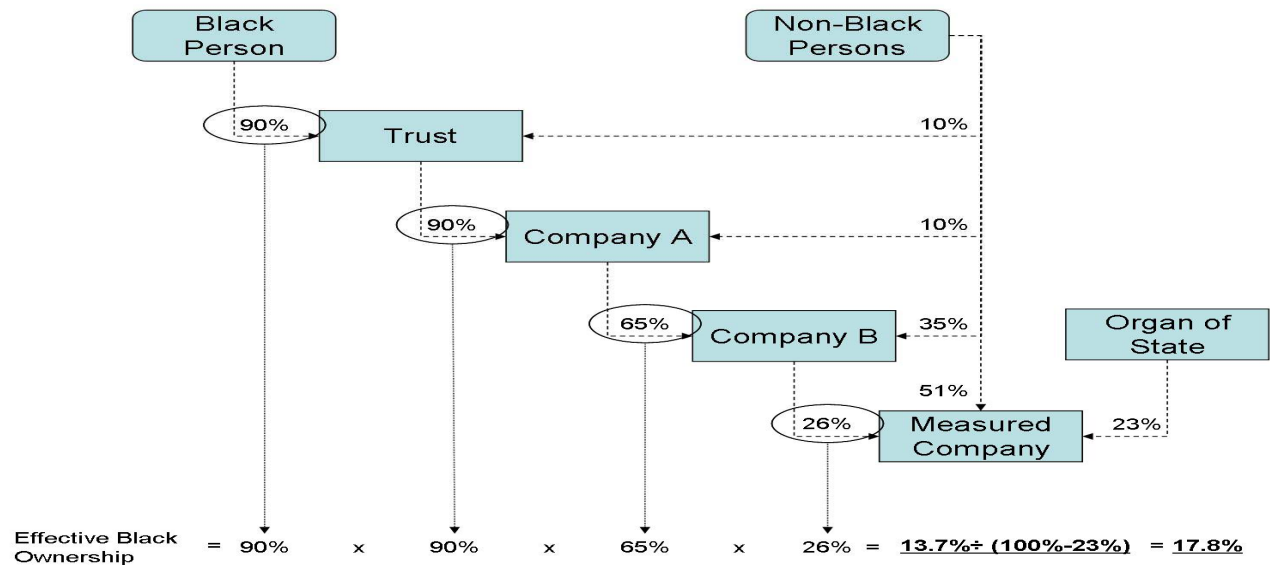
9.4 The following diagram indicates the manner of calculating the effective black ownership in a measured company with four tiers of ownership using the Control Principle:



**Figure 100-3: Illustration of Control Principle:** The actual level of black ownership at each level in the ownership chain is included in the calculation of the "effective black ownership", with the exception of the black majority controlled companies (Company A and Company B) where each of those companies are treated as if they were 100% controlled by black people.

## 10 THE EXCLUSION PRINCIPLE

- 10.1 In calculating the level of ownership by black people in a Measured Enterprises in which an organ of state or a public entity has invested any capital, the Measured Enterprise is entitled to exclude from all formulae contemplated in paragraphs 13 to 18,
- 10.1.1 the Economic Interest or Exercisable Voting Rights attaching to any instrument held by an organ of state; or
- 10.1.2 that portion of the Economic Interest attributable to an organ of state when attached to an instrument held by a public entity,
- 10.2 This principle does not apply to capital invested by an organ of state or a public entity on behalf of a natural person.
- 10.3 The Flow-Through Principle must be applied to determine the extent of the excluded Economic Interest or Voting Rights referred to in this paragraph.
- 10.4 The following diagram indicates the manner of calculating the effective black ownership in a measured company with four tiers of ownership using the Exclusion Principle:



**Figure 100-4: Illustration of Exclusion Principle:** The actual level of black ownership at each level in the ownership chain is included in the calculation of the "effective black ownership", but the result of that calculation (measured using the Flow-Through Principle) is adjusted for the exclusion of the ownership by the organ of state.

## 11 MEASUREMENT OF OWNERSHIP BY BROAD-BASED OWNERSHIP SCHEMES

A black person may be considered a Deemed Participant in a Broad-Based Ownership Scheme if:

- 11.1 that black person is entitled to receive distributions from or receive benefits from the Broad-Based Ownership Scheme or from its fiduciaries;
- 11.2 the constitution of the Broad-Based Ownership Scheme is so structured as to allow the scheme or its fiduciaries no discretion with respect to:
  - 11.2.1 the identification of its Deemed Participants; and
  - 11.2.2 the proportion in which each of its Deemed Participants will share in Economic Interest of the scheme;
- 11.3 all of the Deemed Participants as identified in terms of paragraph 11.2.1 must be entitled to participate in the appointment of the fiduciaries of the Broad-Based Ownership Scheme to the full extent permissible by law;
- 11.4 at least one of the fiduciaries of a Broad-Based Ownership Scheme is an independent person, suitably qualified to participate in the financial management of the scheme, and that fiduciary:

- 11.4.1 is nominated by Deemed Participants;
- 11.4.2 in the case of an Employee Scheme, may be an official of a trade union representing the one or more of the Deemed Participants; and
- 11.4.3 is not an advisor to, an employee of, or a Participant in, the Measured Enterprise in which the Broad-Based Ownership Scheme participates, or any other Enterprise through which the Broad-Based Ownership Scheme participates in the Measured Enterprise;
- 11.5 all the Deemed Participants identified paragraph 11.6 are entitled and able to participate in the management of the Broad-Based Ownership Scheme at a level at least equivalent to the level of participation required in respect of shareholders of a private company with shares.
- 11.6 the identity of a Deemed Participant may be expressed either by reference to:
  - 11.6.1 the person's name; or
  - 11.6.2 the person's membership in a specified class of natural persons, including employees of an Enterprise or members of a community;
- 11.7 the proportion in which Deemed Participants will share in the Economic Interest of a Broad-Based Scheme may be expressed either:
  - 11.7.1 as fixed percentages; or
  - 11.7.2 as the result of a formula against which that proportion may be determined;
- 11.8 the constitution, or other relevant statutory documents, of the Broad-Based Ownership Scheme must:
  - 11.8.1 be available, upon request, to any Deemed Participant:
    - 11.8.1.1 in an official language in which that person is conversant; and
    - 11.8.1.2 to the extent necessary, with its content summarised in a user-friendly manner, taking into account levels of literacy or numeracy; and
  - 11.8.2 deal with all relevant issues specified in Annexe 100-A;
- 11.9 the Broad-Based Ownership Scheme must be so structured as to require the payment of all accumulated Economic Interest to the intended Deemed Participants at the earlier of:
  - 11.9.1 a date or event specified in the constitution or other relevant statutory documents of the



scheme; or

11.9.2 the termination or winding-up of the scheme;

11.10 all costs incurred by the Broad-Based Ownership Scheme in its administration, including the fees of any professional advisors of the scheme or its fiduciaries, are payable out of the Economic Interest payable to the scheme only if those costs are:

11.10.1 market-related;

11.10.2 reasonable; and

11.10.3 disclosed to all intended Deemed Beneficiaries; and

11.11 the financial reports of the Broad-Based Ownership Scheme must be presented to the intended Deemed Participants:

11.11.1 annually at an annual general meeting called in accordance with the related provisions of Annexe 100-A; and

11.11.2 in a manner that is clear and understandable to the intended Deemed Participants.

## **12 MEASUREMENT OF OWNERSHIP BY TRUSTS**

In determining the level of black participation in the Economic Interest and Exercisable Voting Rights of a Measured Enterprise held through a trustee of a trust, which is not a Broad-Based Ownership Scheme, the following requirements must be complied with in order for the participation by black people of such trusts to be recognised:

12.1 the entitlement of a black beneficiary to receive distributions or benefits from the trustee(s) of the trust must vest, provided that if such entitlement does not vest, but the trust deed is so structured as to allow the trustee(s) no discretion as to the identity of the black beneficiaries and as to the proportions in which such black beneficiaries will share in Economic Interest received by the trustee(s), this requirement will be deemed to have been met in the absence of vesting;

12.2 the identity of black beneficiaries may be expressed either by reference to

12.2.1 the person's name; or

12.2.2 the person's membership in a specified class of natural persons;

12.3 the proportion in which black beneficiaries will share in the Economic Interest flowing from a trust may be expressed either:

- 12.3.1 as fixed percentages; or
- 12.3.2 as the result of a formula against which that proportion may be determined;
- 12.4 save to the extent that the trust is a family trust, all of the black beneficiaries as identified in terms of paragraph 12.2 must be entitled and able to participate in the appointment of the trustee(s) to the full extent permissible by law;
- 12.5 the trust deed must be so structured as to require the payment of all accumulated Economic Interest to the beneficiaries of the trust at the earlier of:
  - 12.5.1 a date or event specified in the trust deed; or
  - 12.5.2 the termination or winding-up of the trust.

### **13 MEASUREMENT OF OWNERSHIP ARISING FROM THE HOLDING OF OPTION TYPE INSTRUMENTS AND SHARE WARRANTS**

If a Participant holds an instrument granting him/her the right to acquire an Equity Interest at a later date:

- 13.1 Exercisable Voting Rights attached to or arising from that instrument and irrevocably transferred to the holder of that instrument for the duration of the option period and which are exercisable by the holder prior to the acquisition of an Equity Interest will be recognised as Exercisable Voting Rights;
- 13.2 the value of any Economic Interest irrevocably transferred for the duration of the option period and paid to the holder of that instrument prior to the exercise of that right will be considered to be Economic Interest; and
- 13.3 the value of that instrument, as determined in accordance with an Acceptable Valuation Standard, will be applied to the calculation of Net Equity Interest in paragraph 17.

### **14 DEBT FINANCING INSTRUMENTS INCLUDING DEBT FINANCING PREFERENCE SHARES**

- 14.1 A preference share in a company with shares (or a similar instrument used in any other form of Enterprise) which has the characteristics of debt:
  - 14.1.1 will be treated as an ordinary loan subject to measurement under Net Equity Interest; and
  - 14.1.2 for the avoidance of doubt, any preference dividends paid pursuant to that preference

share (or similar instrument) does not constitute Economic Interest.

- 14.2 All other forms of debt equity instruments in any Enterprise will be treated in accordance with paragraph 14.1 if they have the characteristic of debt.
- 14.3 To the extent that an instrument as contemplated in paragraphs 14.1 and 14.2 has a hybrid nature which includes the characteristics of debt and of equity, only that portion that represents debt, measured using an Acceptable Valuation Standard, shall benefit from the provisions of paragraphs 14.1.1 and 14.1.2.
- 14.4 Any payment by a Measured Enterprise to a Participant which falls within the provisions of paragraphs 14.1 and 14.2 is not to be included in the any calculation of Economic Interest in this statement.

## 15 MEASUREMENT OF VOTING RIGHTS

- 15.1 The ownership criteria provided for in paragraphs 5.1.1 and 5.1.2, as these apply to Exercisable Voting Rights in a Measured Enterprise, are calculated on the following basis:

$$A = \frac{B}{C} \times D$$

Where

**A** is the score achieved in respect of the Enterprise for the ownership criteria being measured

**B** is the percentage that Exercisable Voting Rights in the hands of the category of Participants who are black people in that Enterprise holds to the total of all Voting Rights held by all Participants of that Enterprise

**C** is the percentage compliance Target for Exercisable Voting Rights in respect of the applicable ownership criteria being measured as specified in paragraph 5.1

**D** is the Weighting points allocated to the applicable ownership criteria being measured as specified in paragraph 5.1

- 15.2 The formula in this paragraph must be applied in compliance with the Flow-Through Principle or Control Principle.
- 15.3 If an Enterprise attains a score in respect of the formula above that is in excess of the corresponding Weighting points in paragraph 5.1, that Enterprise will only be entitled to

the corresponding Weighting points.

## 16 MEASUREMENT OF ECONOMIC INTEREST

- 16.1 The ownership criteria provided for in paragraphs 5.2.1 to 5.2.3, as these apply to Economic Interest in a Measured Enterprise, are calculated on the following basis:

$$A = \frac{B}{C} \times D$$

Where

**A** is the recognisable percentage of black Participant entitlement to Economic Interest in the Enterprise

**B** is the percentage that Economic Interest to which Participants who fall within the category of black people in that Enterprise holds to the total of all Economic Interest to which all Participants of that Enterprise are entitled

**C** is the percentage compliance Target for Economic Interest in respect of the applicable ownership criteria being measured as specified in paragraph 5.2

**D** is the Weighting points allocated to the applicable ownership criteria being measured as specified in paragraph 5.2

- 16.2 The formula in paragraph must be applied in compliance with the Flow-Through Principle or Modified Flow-Through Principle.
- 16.3 If an Enterprise attains a score in respect of the formula in this paragraph that is in excess of the corresponding Weighting points in paragraph 5.2, that Enterprise will only be entitled to the corresponding Weighting points.

## 17 REALISATION POINTS

- 17.1 The "Net Equity Interest" points in respect of the Measured Enterprise provided for in paragraph 5.3.2 are awarded upon the basis of the lower result of Formula A and Formula B below:

Formula **A**

$$A = B \times \left( \frac{1}{25\% \times C} \right) \times 7$$

Where

**A** is the score under paragraph 5.3.2

**B** is the Deemed Current Value of instruments held by black Participants in the Measured Enterprise as determined in accordance with the provisions of paragraph 17.6

**C** is the graduation factor of the compliance target to be achieved over a period of time as outlined below:

- **10%** for the first year after the effective date, such effective date to be announced by the Minister in a Gazette.
- **20%** for the second year after the effective date, such effective date to be announced by the Minister in a Gazette.
- **40%** from the first day of the third year after the effective date to the last day at the end of the fourth year after the effective date.
- **60%** from the first day of the fifth year after the effective date to the last day at the end of the sixth year after the effective date.
- **80%** from the first day of the seventh year after the effective date to the last day at the end of the eighth year after the effective date.
- **100%** from the first day of the ninth year after the effective date to the last day at the end of the tenth year after the effective date.

Formula **B**

$$A = \frac{B}{C} \times 7$$

Where

**A** is the score under paragraph 5.3.2

**B** is the percentage Economic Interest in the Measured Enterprise to which black Participants are entitled measured in accordance with the Flow-Through Principle (and specifically excluding the Modified Flow-Through, the Control and the Exclusion principles)

**C** is the target specified in respect of the ownership criteria in paragraph 5.2.1

- 17.2 If an Enterprise attains a score in respect of the formula in paragraph 17.1 which is in excess of the corresponding Weighting points in paragraph 5.3.2, that Enterprise will only be entitled to the corresponding Weighting points.
- 17.3 The conditions for Ownership Fulfilment are met when a black Participant holding an Economic Interest is released from all third party legal or commercial rights that withhold, defer or restrict the enjoyment of those rights or has never been subject to any such third party legal or commercial rights.
- 17.4 For the purposes of paragraph 17.3:
- 17.4.1 a third party legal or commercial right shall be limited to rights created primarily as a means to secure, for a lender, payment of a loan or other financing arrangement advanced to the Participant for the purposes of acquiring an instrument to which the effected Economic Interest attaches;
- 17.4.2 A third party right against a juristic person or trust that:
- 17.4.2.1 exists between the Measured Enterprise and the ultimate black Participant; and
- 17.4.2.2 was created primarily as a means to secure payment of a debt arising from the acquisition of the instrument through which the ultimate black Participant's interest in the Measured Enterprise is achieved,
- will be deemed to be a third party right against the ultimate black Participant.
- 17.5 The Ownership Fulfilment point will not be awarded unless the Measured Enterprise has attained a score of 7 points for Net Equity Interest in accordance with the formula in paragraph 17.1.
- 17.6 The "Deemed Current Value" referred to in the formula in paragraph 17.1 must be determined in accordance with the following formula:

$B = \frac{D - E}{F}$
<p>Where</p> <p><b>B</b> is the Deemed Current Value to be included in the calculation of the formula in paragraph 17.1</p> <p><b>D</b> is the value of the instrument(s) to which a black Participant's Economic Interest</p>

attaches in the Measured Enterprise upon the date of measurement

**E** is the carrying value of any third party rights or claims that may exist against that black Participant as a result of the financing of the acquisition of the instrument(s) to which a black Participant's Economic Interest attaches in the Measured Enterprise

**F** is the current value of the Measured Enterprise upon the date of measurement

- 17.7 All valuations undertaken for the purposes of the formula in paragraph 17.6 must be undertaken in accordance with an Acceptable Valuation Standard.
- 17.8 In calculating the Net Equity Interest for the purpose of the formula in paragraph 17.6, debt in the hands of an Enterprise between the Measured Enterprise and the ultimate black Participant which was advanced to that Enterprise in order to finance the acquisition of the instrument through which the ultimate black Participant's Interest in the Measured Enterprise is achieved, will be deemed to be a claim against that black Participant.

## 18 THE MEASUREMENT OF THE BONUS POINTS

- 18.1 The bonus points will be awarded in accordance with the following formula:

$$A = \frac{B}{15\%} \times \frac{C}{25} \times 3$$

Where

**A** is the bonus points awarded in terms of paragraph 5.4.1

**B** is percentage of the Economic Interest in the Measured Enterprise to which black new entrants and/or black Deemed Participants in Broad-Based Ownership Schemes are entitled, measured in accordance with the Flow-Through Principle (and specifically excluding the Modified Flow-Through, the Control and the Exclusion principles) up to a maximum of 15%

**C** is percentage of the Economic Interest in the Measured Enterprise to which black people are entitled, measured in accordance with the Flow-Through Principle (and specifically excluding the Modified Flow-Through, the Control and the Exclusion principles) up to a maximum of 25%

- 18.2 A Measured Enterprise will be entitled to a maximum of 3 bonus points under the ownership scorecard provided for in paragraph 5 if it can demonstrate that:

18.2.1      black new entrants; or

18.2.2      black Deemed Participants in Distribution Schemes or Employee Schemes,

are entitled to 15% of the Economic Interest of that Measured Enterprise, measured using the Flow-Through Principle (and specifically excluding the Modified Flow-Through, the Control and the Exclusion principles).



## **1 ADMINISTRATIVE MATTERS**

- 1.1 Every Broad-Based Ownership Scheme shall have:
  - 1.1.1 a postal address to which all communications and notices may be addressed; and
  - 1.1.2 an official office to which all communications and notices may be addressed and from which Deemed Beneficiaries may obtain information pertaining to the scheme.
- 1.2 Any change in the addresses stipulated in article 1.1, shall be communicated in writing to each individual Deemed Participants and shall be otherwise advertised in such venues as may be accessible by the majority of the Deemed Beneficiaries.
- 1.3 The names and contact details of all fiduciaries of any Broad-Based Ownership Schemes shall be distributed to all Deemed Beneficiaries in writing on an annual basis. Deemed Beneficiaries shall be entitled to obtain such details from the official office.
- 1.4 Any change in the details of the fiduciaries, shall be communicated in writing to each individual Deemed Participants in writing.
- 1.5 Each Broad-Based Ownership Scheme shall maintain at its official office a register of all investments made by the scheme and such register shall be accessible to any Deemed Participant upon reasonable request.
- 1.6 The register of investments shall contain sufficient detail as to the nature and size of any investments made as well as any information as to the most recent valuation of the investment reflecting both the value of the investment and any third party claims arising from the financing of the investment. Such a valuation must be undertaken at least once in every 12 month period.
- 1.7 The register of investments shall be open to inspection by Deemed Participants at the official office during office hours.
- 1.8 Each Broad-Based Ownership Scheme shall maintain at its official office an updated register of all current Deemed Participants and such register shall be accessible to any Deemed Participant or Verification Agency upon reasonable request.
- 1.9 The register of Deemed Participants shall be open to inspection by Deemed Participants at the official office during office hours.

## **2 FIDUCIARIES**

- 2.1 The names and contact details of all fiduciaries of any Broad-Based Ownership Schemes shall be distributed to all Deemed Beneficiaries in writing on an annual basis. Deemed Beneficiaries shall be entitled to obtain such details from the official office.
- 2.2 Any change in the details of the fiduciaries, shall be communicated in writing to each individual Deemed Participants in writing.
- 2.3 The remuneration of the fiduciaries shall from time to time be determined by the Broad-Based Ownership Scheme in general meeting.
- 2.4 The powers of the fiduciaries of a Broad-Based Ownership Scheme shall be as stated in the constitutional and statutory documents of that scheme.
- 2.5 The manner of appointment and the number of fiduciaries of a Broad-Based Ownership Scheme shall be as stated in the constitutional and statutory documents of that scheme, provided that at least 50% of fiduciaries shall be elected by the Deemed Participants at a general meeting of the scheme.
- 2.6 The business of the Broad-Based Ownership Scheme shall be managed by the fiduciaries who may exercise all such powers of the Broad-Based Ownership Scheme as may be specified in the constitutional and statutory documents.
- 2.7 The fiduciaries of a Broad-Based Ownership Scheme shall cause minutes of the proceedings at any meeting of the scheme to be entered into a minute book kept for the purpose, within one month after the date on which the meeting was held. Such minute books shall be open to inspection by any Deemed Participant at the official office during office hours. Minutes shall also be posted at such venues as may be accessible to the majority of the Deemed Participants.
- 2.8 The fiduciaries shall cause such accounting records for the Broad-Based Ownership Scheme to be kept in compliance with the South African Generally Accepted Accounting Practices. The accounting records shall be open to inspection by Deemed Participants at the official office during office hours.
- 2.9 The fiduciaries shall annually cause to be prepared and laid before the Deemed Participants in general meeting the annual financial statements of a Broad Based Ownership Scheme.

### **3 MEETINGS OF THE BROAD-BASED OWNERSHIP SCHEME**

- 3.1 Every Broad-Based Ownership Scheme shall hold an annual general meeting of all Deemed Participants not more than nine months after the end of every financial year of that Broad-Based Ownership Scheme.
- 3.2 The annual general meeting of a Broad-Based Ownership Scheme shall deal with and dispose of the matters prescribed herein and may deal with and dispose of such further matters as are provided for in its constitutional or statutory document
- 3.3 A Broad-Based Ownership Scheme which has failed to hold its annual general meeting within the time shall forfeit its status as a Broad-Based Ownership Scheme.
- 3.4 A copy of any annual financial statements must be laid before the Deemed Participants in annual general meeting and must be provided to all Deemed Participants not less than twenty-one days before the date of the meeting.
- 3.5 A Broad-Based Ownership Scheme need not hold any particular annual general meeting if all Deemed Participants entitled to attend that meeting agree thereto in writing, and in such event a resolution in writing dealing with and disposing of the matters required hereinafter to be dealt with and disposed of at an annual general meeting of a Broad-Based Ownership Scheme, and such other matters, if any, as may be dealt with at such a meeting, and signed by all Deemed Participants entitled to vote at that meeting, before the expiration of the period within which that meeting is to be held, shall be deemed to be a resolution passed at an annual general meeting of the Broad-Based Ownership Scheme held on the date on which the last signature to such resolution is affixed.
- 3.6 Ordinary general meetings of a Broad-Based Ownership Scheme may be held from time to time.
- 3.7 The fiduciaries of a Broad-Based Ownership Scheme shall on the request of ten Deemed Participants of the Broad-Based Ownership Scheme or of Deemed Participants holding at the date of the lodging of the request, not less than one-twentieth of the votes to which all Deemed Participants are entitled at a general meeting of the Broad-Based Ownership Scheme within fourteen days of the lodging of the request issue a notice to Deemed Participants convening a general meeting of the Broad-Based Ownership Scheme for a date not less than twenty-one and not more than thirty-five days from the date of the notice.

- 3.8 If the fiduciaries do not issue a notice as required within 14 days as provided in article 3.7, the Deemed Participants requesting such meeting may themselves convene the ordinary general meeting on twenty-one days' notice.
- 3.9 Unless convened by Deemed Participants as contemplated in article 3.8, the fiduciaries of a Broad-Based Ownership Scheme shall ensure that in respect of any general meeting convened Deemed Participants of the Broad-Based Ownership Scheme will receive notice of any resolution which may properly be moved and is intended to be moved at that meeting.
- 3.10 Notice of a general meeting of a Broad-Based Ownership Scheme shall be communicated to every Deemed Participant of the Broad-Based Ownership Scheme in such manner as may be prescribed in that schemes constitutional or statutory documents, provided that the fiduciaries of that scheme shall in any event apply all reasonable endeavours in ensuring that every Deemed Participant is notified of the meeting and of any resolutions to be considered in good time.
- 3.11 Any Deemed Participants of a Broad-Based Ownership Scheme entitled to attend and vote at a meeting of the Broad-Based Ownership Scheme and Deemed Participants of such Broad-Based Ownership Scheme, shall be entitled to appoint another Deemed Participants as his/her proxy to attend, speak, and vote in his/her stead at any meeting of the Broad-Based Ownership Scheme provided that such appointment is in writing and presented by the proxy at the general meeting. In this regard, in every notice calling a meeting of a Broad-Based Ownership Scheme there shall appear with reasonable prominence a statement that a Deemed Participants entitled to attend and vote at the meeting are entitled to appoint a proxy
- 3.12 The quorum for any general meeting of a Broad-Based Ownership Scheme shall be such number of Deemed Participants as may hold 20% of the total number of votes to which all Deemed Participants of the Broad-Based Ownership Scheme are entitled, present in person or represented by proxy.
- 3.13 General meetings of a Broad-Based Ownership Scheme shall be chaired by one of its fiduciaries.
- 3.14 If at any meeting of a Broad-Based Ownership Scheme, the quorum referred to in article 3.12 is not achieved, the chairman shall adjourn the meeting to a day not earlier than seven days and not later than twenty-one days after the date of the meeting. If the quorum

referred to in article 3.12 is not achieved at the next meeting, any decision of the majority of Deemed Participants present in person or represented by proxy at that next meeting, shall be deemed to a decision of the majority of all of the Deemed Participants of that scheme.

- 3.15 Every Deemed Participants of a Broad-Based Ownership Scheme shall have a right to exercise one vote at meetings of that Broad-Based Ownership Scheme. The exercise of votes shall be either by way of show of hands, or upon request of Deemed Participants holding 10% of the votes of Deemed Participants present in person or represented by proxy at a meeting, by ballot.
- 3.16 Notwithstanding the provisions of article 3.14, no resolution to amend, vary or substitute the constitutional or statutory documents of a Broad-Based Ownership Scheme, to vary the rights of Deemed Participants as recorded in those constitutional or statutory documents or to wind up the scheme shall be validly passed unless a majority of all Deemed Participants have voted in favour of such resolution.
- 3.17 The following matters shall be determined at a general meeting of a Broad-Based Ownership Scheme:
  - 3.17.1 save to the extent that the constitutional and salutatory documents of a Broad-Based Ownership Scheme otherwise provide, the making of any investment or the acquisition or purchase of shares other than the shares initially acquired upon the creation of the Broad-Based Ownership Scheme;
  - 3.17.2 save to the extent that the constitutional and statutory documents of a Broad-Based Ownership Scheme otherwise provide, any disposal of any investment of shares as contemplated in article 3.17.1;
  - 3.17.3 the appointment of the fiduciaries of a Broad-Based Ownership Scheme appointed by the Deemed Participants;
  - 3.17.4 the dismissal of the fiduciaries of a Broad-Based Ownership Scheme appointed by the Deemed Participants;
  - 3.17.5 any matter relating to the financing capital or borrowings of the Broad-Based Ownership Scheme;
  - 3.17.6 the borrowing of any money or the incurring of any debt other than the borrowing initially made upon the creation of the Broad-Based Ownership Scheme; and

3.17.7 the appointment of auditors and other professional advisors of the Broad-Based Ownership Scheme.

## **Annexe 100-B: Cautions and Guidance to Persons Interpreting this statement**

### **1 NON CIRCUMVENTION**

- 1.1 The potential for circumvention is great in relation to the following aspects of this statement:
  - 1.1.1 Ownership fulfilment;
  - 1.1.2 Voting Rights;
  - 1.1.3 Economic Interest; and
  - 1.1.4 Trusts and Broad Based Ownership Schemes.
- 1.2 When determining whether a black Participant holds an entitlement to Economic Interest, careful consideration must be given to whether that entitlement is subject to any third party rights. If that third party right falls within the criteria specified for Ownership Fulfilment, they are provided for within this statement. If, however, they do not fall within those criteria, it is possible that those third party rights have been specifically created with a view to circumventing the objectives of the Act. As such, all third party rights must be closely analysed and where appropriate.
- 1.3 When determining the extent of Exercisable Voting Rights to which black Participants are entitled, all relevant agreements between Participants and between black Participants and their financiers must be analysed. Wherever a black Participant is prohibited from exercising a Voting Right, that Voting Right shall not be counted.
- 1.4 When determining the extent of Economic Interest to which black Participants are entitled, all payments made by the Measured Enterprise to its Participants must be analysed. Clearly, some of payments, which are not in the nature of dividends payable to shareholders of a company having shareholding, may be entirely legitimate and should never be deemed to constitute Economic Interest. However, there exists a significant risk of Enterprises seeking to circumvent the objectives of the Act by making non market related payments or payments without a commercial rational to their non-black Participants in order to disguise the actual economic benefits received by those non-black Participants. As such all payments made to any Participant should be fully disclosed and objectively justified (preferably by an auditor or accounting officer of the Enterprise).
- 1.5 In relation to trusts and Broad-Based Ownership Schemes, there exists a potential for

circumvention arising from the diminished level of control exercised by deemed Participants holding rights through those structures. As such, careful attention must be paid to the constitutional documents of trusts and Broad-Based Ownership Schemes so as to ensure that:

- 1.5.1 the Deemed Participants are fully empowered to understand and comment upon the decisions of the fiduciaries or authorised representatives of those schemes;
  - 1.5.2 mechanisms exists for the consultation of the Deemed Participants within the confines of the law; and
  - 1.5.3 Economic Interest received by the trusts and Broad-Based Ownership Schemes must be payable to the Deemed Participants, or utilised for their advancement or invested on their behalf for their gain.
- 1.6 Also in relation to trusts and Broad-Based Ownership Schemes, care should be taken to examine closely those provisions of the constitutional documents that relate to the procedure to be followed with regard to any monetary reserves in such trusts or Broad-Based Ownership Schemes in the event of their winding up.