ANNEXURE A

The Ten Principles

The UN Global Compact's ten principles in the areas of human rights, labour, the environment and anti-corruption enjoy universal consensus and are derived from:

- The Universal Declaration of Human Rights
- The International Labour Organization's Declaration on Fundamental Principles and Rights at Work
- The Rio Declaration on Environment and Development
- The United Nations Convention Against Corruption

The UN Global Compact asks companies to embrace, support and enact, within their sphere of influence, a set of core values in the areas of human rights, labour standards, the environment and anti-corruption:

Human Rights

- Principle 1: Businesses should support and respect the protection of internationally proclaimed human rights; and
- Principle 2: make sure that they are not complicit in human rights abuses.

Labour

- Principle 3: Businesses should uphold the freedom of association and the effective recognition of the right to collective bargaining;
- Principle 4: the elimination of all forms of forced and compulsory labour;
- Principle 5: the effective abolition of child labour; and
- Principle 6: the elimination of discrimination in respect of employment and occupation.

Environment

- Principle 7: Businesses should support a precautionary approach to environmental challenges;
- Principle 8: undertake initiatives to promote greater environmental responsibility; and
- Principle 9: encourage the development and diffusion of environmentally friendly technologies.

Anti-Corruption

- Principle 10: Businesses should work against corruption in all its forms, including extortion and bribery.

ANNEXURE B

OECD OCDE

DIRECTORATE FOR FINANCIAL, FISCAL AND ENTERPRISE AFFAIRS

ANTI-CORRUPTION INSTRUMENTS AND THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES

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ANTI-CORRUPTION INSTRUMENTS AND THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES*

Executive Summary

- The Guidelines seek to promote and facilitate companies' contribution to the fight against corruption.

- The anti-corruption content of the Guidelines is broader than that of the Convention and the Revised Recommendation, as the Guidelines cover private sector bribery, solicitation of bribes and extortion. They also encourage companies to extend their anti-corruption programmes to their subsidiaries and business partners.

- The standards promoted by the Guidelines reflect more than just the perspectives of developed countries. These standards can be found in other inter-governmental instruments adhered to by a wide range of non-member countries. They have also been integrated in the anti-corruption initiatives of several international private sector associations.

- The Guidelines' distinctive contribution as an anti-corruption instrument is that it provides a framework through which governments and civil society can encourage companies' contribution to the fight against corruption.

Introduction

The problem of corruption has been receiving growing attention in the past 15 years and various inter-governmental and non-governmental organisations have developed anti-corruption instruments. The OECD has adopted several policy instruments that contribute, directly or indirectly, to the fight against corruption.

The 2000 Review of the *OECD Guidelines for Multinational Enterprises* resulted in the addition of a new chapter on combating bribery. This new dimension of the OECD Guidelines for Multinational Enterprises (hereafter the Guidelines) has been highlighted in the OECD Ministerial Communiqué of 2002. Under the heading "Ensuring integrity and transparency in the international economy", OECD Ministers agreed "to continue to promote implementation of the OECD Guidelines for Multinational Enterprises, which provide recommendations for responsible corporate behaviour, in particular in such areas as transparency and anti-corruption."

How do the Guidelines relate to other inter-governmental and non-governmental anti-corruption instruments? This paper provides information that helps to answer this question.

This paper is structured as follows. Part I gives an overview of the OECD integrity instruments and of seven major international anti-corruption instruments. Part II presents, in detail, the anti-bribery contents of

* This study was prepared by Irène Hors, Economist, Anti-Corruption Division, OECD. It was reviewed by the Committee for International Investment and Multinational Enterprises and the Working Group on Bribery.

the Guidelines and compares these with other instruments. Part III reviews the main international private initiatives in this field.

I. Overview of Key Inter-Governmental Integrity Instruments

I.1 OECD integrity instruments

The OECD has 9 instruments that contribute to the fight against corruption. These instruments differ in their scope and functions.

A first set of five instruments tackle the problem of bribery in international transactions: these instruments focus exclusively on bribery of foreign public officials in international business transactions "to obtain or retain business or other improper advantage". This means, for example, that they do not cover facilitation payments, i.e. payments "made to induce public officials to perform their functions, such as issuing licences or permits"[1].

They are, in chronological order of adoption:

- The Recommendation of the Council on Combating Bribery in International Business Transactions and its revised version;
- The Recommendation of the Council on the Tax Deductibility of Bribes to Foreign Public Officials;
- The Recommendation on Anti-Corruption Proposals for Aid-Funded Procurement;
- The Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (hereafter the Convention)[2]; and
- The Action Statement on Bribery and Officially Supported Export Credits.

The second set of OECD instruments has not been designed exclusively to address corruption, but nevertheless contribute to the fight against it:

- The Recommendation of the Council on Improving Ethical Conduct in the Public Service Including Principles for Managing Ethics in the Public Service;
- The OECD Principles of Corporate Governance;
- The OECD Guidelines for Multinational Enterprises; and
- The Draft Guidelines for Managing Conflicts of Interest in the Public Service[3].

These instruments have a broader anti-corruption scope than the first set of instruments. The Recommendation on Anti-Corruption Proposals for Aid-Funded Procurement, the Recommendation on Ethical Conduct in the Public Service and the Guidelines on Conflicts of Interest address both domestic and international public corruption. Even broader, the Principles on Corporate Governance and the Guidelines (see part II) can impact domestic and international, public and private-to-private corruption practices.

Most of the measures recommended in these instruments, other than the Guidelines and the Principles on Corporate Governance, are to be implemented by governments. They fulfil four main complementary functions:

- *Repression*: this includes defining offences (of bribery and related offences, such as money laundering) and setting up State mechanisms to investigate and sanction the breaching of the law.

- *Detection*: this includes defining and supporting the role different actors can play detecting potential cases of corruption (for instance tax inspectors, auditors).

- *Prevention in a repression perspective*: increasing the transparency of public and private operations, through for instance the adoption of measures to facilitate access to information.

- *Prevention in an incitation perspective*: changing the logics of action which lead public or private actors to bribery. For instance, managing conflicts of interest in the public service allows protecting the integrity of official decision-making.

Certain instruments also address the role of the private sector and recommend that companies undertake measures to make sure that their internal organisation and culture help prevent corruption. It is the focus of the chapter on bribery of the OECD Guidelines for Multinational Enterprises.

These instruments present different synergies. For example, the Revised Recommendation on Combating Bribery in International Business Transactions (hereafter the Revised Recommendation) complements the Convention, as it contains the non-criminal elements of the sets of action engaged to curb bribery in international business transactions. Another instance is that both the Tax Deductibility Recommendation and the Exports Credits Action Statement derive from the criminalisation of bribery of foreign public officials: they define related rules and call for implementing measures, and in doing so, consolidate the definition of bribery of foreign public officials as an offence[4]. Yet another example is the Recommendation on ethical conduct in the public service, which addresses the demand side of international (and domestic) public bribery and thereby complements instruments focusing on the supply side.

Synergies also exist between the Guidelines and other OECD integrity instruments in that the Guidelines encourage companies to comply with the standards spelled out in other instruments and therefore contribute to their enforcement. This function is a crucial contribution to the overall anti-corruption framework and it should not be overlooked. Theory and evidence suggest that compliance with the law does not depend only on the risk of being caught and the consequences associated with it, balanced against the profits provided by breaking the law (see Scholz, 1997)[5]. This in itself justifies the need for policy instruments such as the Guidelines and for measures that enhance and complement the deterrence effect of laws and sanctions[6].

I.2 Some major inter-governmental instruments

Other anti-corruption instruments have been developed by inter-governmental organisations, covering different geographical regions. This paper considers seven such instruments:

- The Forty Financial Action Task Force Recommendations;

- The Inter-American Convention against Corruption, developed by the Organisation of American States;

- The European Union Convention on the Fight Against Corruption Involving Officials of the European Communities or Officials of Member States
- The Council of Europe Criminal Law Convention on Corruption;
- The Council of Europe Civil Law Convention on Corruption;
- The Southern African Development Community Protocol on Corruption; and
- The United Nations Draft Convention against Corruption.

The Inter-American Convention and the EU Convention address domestic and international public corruption. The other five have a broader anti-corruption scope, as they address domestic and international public and private corruption. The strategies underpinning these instruments are similar to that of OECD integrity instruments, in that they aim to fulfil similar functions. We will see in part II how they address the role of companies in the fight against corruption.

Table 1 summarises information on the year of adoption, the participating countries, the anti-corruption scope and the supporting institutional mechanisms for implementation of these 16 policy instruments.

Box 1 – Major Inter-Governmental Anti-Corruption Instruments[7]

The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions

The OECD Convention is relatively narrow and specific in its scope. Its sole focus is the use of domestic law to criminalise the bribery of foreign public officials. It focuses on "active bribery", meaning the offence committed by the person who promises or gives the bribe, as contrasted with "passive bribery", the offence committed by the official who receives the bribe. It does not apply to forms of corruption other than bribery, bribery which is purely domestic, or bribery in which the direct, indirect or intended recipient of the benefit is not a public official. It also does not include cases where the bribe was paid for purposes unrelated to the conduct of international business and the gaining or retaining of some undue advantage in such business.

The OECD Revised Recommendation on Combating Bribery in International Business Transactions

Whereas the Convention focuses on a specific issue, the criminalising of bribery of foreign public officials in a commercial framework, the Revised Recommendation contains the entire programme defined by participant countries to curb corruption in international transactions. It covers such areas as: taxation; company and business accounting and audit rules and procedures; banking, financial and other relevant provisions; public subsidies, licenses, government procurement contracts or other public advantages that could be denied as sanctions for bribery in appropriate cases.

The Forty Financial Action Task Force Recommendations

The Financial Action Task Force on Money Laundering (FATF) is an inter-governmental body whose purpose is the development and promotion of policies to combat money laundering -- the processing of criminal proceeds in order to disguise their illegal origin. These policies aim to prevent such proceeds from being utilised in future criminal activities and from affecting legitimate economic activities. The Task Force members agreed to implement the forty FATF Recommendations, which set out the basic framework for anti-money laundering efforts. They cover the criminal justice system and law enforcement; the financial system and its regulation, and international cooperation.

The Inter-American Convention against Corruption

The Inter-American Convention against Corruption (IACC) is the first international convention against corruption ever adopted (from 6 March 1997). It has been ratified by 29 countries, and is broader in scope than the European and OECD instruments. The IACC provisions can be broadly classified into three groups: Preventive Measures; Criminal Offences; and Mutual Legal Assistance.

The European Union Convention on the Fight against Corruption Involving Officials of the European Communities or Officials of Member States

This Convention stems from an attempt on the part of the European Union to address forms of malfeasance which are harmful to its own financial interests. It only deals with conduct on the part of officials of the European Community and its Member States. The conduct to which it applies is essentially bribery and similar offences, which States Parties are required to criminalise. It does not deal with fraud, money laundering or other corruption-related offences.

The Council of Europe Criminal Law Convention against Corruption

The Convention is drafted as a binding legal instrument and applies to a broad range of occupations and circumstances. It contains provisions criminalising a list of specific forms of corruption, and extending to both active and passive forms of corruption, and to both private and public sector cases. The Convention also deals with a range of transnational cases: bribery of foreign public officials and members of foreign public assemblies is expressly included, and offences established pursuant to the private-sector criminalisation provisions would generally apply in transnational cases in any State Party where a sufficient portion of the offence to trigger domestic jurisdictional rules had taken place.

The Council of Europe Civil Law Convention against Corruption

This is the first attempt to define common international rules for civil litigation in corruption cases. Where the *Criminal Law Convention* seeks to control corruption by ensuring that offences and punishments are in place, the *Civil Law Convention* requires States Parties to ensure that those affected by corruption can sue the perpetrators civilly, effectively drawing the victims of corruption into the Council's anti-corruption strategy. The Civil Law Convention is narrower that its criminal law counterpart in the scope of the forms of corruption to which it applies, extending only to bribery and similar acts. It is not in force.

The Southern African Development Community[8] Protocol on Corruption

In addition to defining and describing corruption as a problem, the purposes of the SADC Protocol on Corruption are threefold: to promote the development of anti-corruption mechanisms at the national level, to promote cooperation in the fight against corruption by States Parties, and to harmonise anti-corruption national legislation in the region. The Protocol provides a wide set of preventive mechanisms which include the development of codes of conduct for public officials, transparency in the public procurement of goods and services, access to public information, protection of whistle-blowers, establishment of anti-corruption agencies, development of systems of accountability and controls, participation of the media and civil society, and the use of public education and awareness as a way of introducing zero tolerance for corruption.

The United Nations Draft Convention against Corruption

During 1999-2001, negotiations began to develop this binding international legal instrument, which would be global in both its approach to the subject and in its geographical application. The negotiations are expected not only to produce the specified instrument, but also to provide a valuable forum in which all Member States of the United Nations can assemble to discuss corruption issues, to develop effective measures against corruption, and to build broad international consensus in support of such measures.

Table 1. OECD Integrity Instruments and Other Inter-Governmental Anti-Corruption Instruments

Instruments	Anti-Corruption Scope	Adopted in	Participating Countries in February 2003	Supporting Institutional Mechanisms for Implementation
OECD Instruments on Bribery of Foreign Officials in International Business Transactions				
1. Revised Recommendation	Bribery of foreign public officials in international business transactions	1994, revised in May 1997	OECD member countries + Argentina, Brazil, Bulgaria, Chile and Slovenia.	OECD Working Group on Bribery in International Business Transactions (peer review monitoring mechanism)
2. Rec. on Tax Deductibility of Bribes to Foreign Public Officials	Bribery of foreign public officials in international business transactions	April 1996	OECD member countries + Argentina, Brazil, Bulgaria, Chile and Slovenia.	- OECD Committee on Fiscal Affairs (self-assessment reports) - OECD Working Group on Bribery in International Business Transactions (peer review monitoring mechanism)
3. Rec. on Anti-Corruption and Aid-Funded Procurement	Bribery of foreign public officials in international business transactions	May 1996	OECD member countries + Argentina, Brazil, Bulgaria, Chile and Slovenia.	- Development Assistance Committee (implementation reports) - OECD Working Group on Bribery in International Business Transactions (peer review monitoring mechanism)
4. Convention	Bribery of foreign public officials in international business transactions	Signed in Nov. 1997; Entered into force in Feb. 1999.	OECD member countries + Argentina, Brazil, Bulgaria, Chile and Slovenia. (Only Ireland has not ratified yet)	OECD Working Group on Bribery in International Business Transactions (peer review monitoring mechanism)
5. AS on Bribery and Export Credits	Bribery of foreign public officials in international business transactions	December 2000	OECD member countries – Iceland (and not relevant for Ireland)	OECD Working Party on Export Credits and Credit Guarantees (survey of member countries)
Other OECD Integrity Instruments				
6. Rec. on Ethical Conduct in the Public Service	Public corruption	April 1998	OECD member countries	OECD Public Management Committee (comparative analysis and information sharing)
7. Principles of Corporate Governance	Public and private corruption	May 1999	OECD member countries	OECD Steering Group on Corporate Governance

8. Guidelines for Multinational Enterprises	Public and private corruption	First adopted in 1976, revised in June 2000	OECD member countries + Argentina, Brazil, Chile, Estonia, Israel, Lithuania and Slovenia.	- OECD Committee on International Investment and Multinational Enterprises (oversight responsibility, reporting, clarification of meaning of recommendations) - National Contact Points (promotion, soft whistle-blowing facilities called "specific instances", mediation and consultations)
9. Draft Guidelines on Conflicts of Interest	Public corruption	Will be considered in April 2003	OECD member countries	OECD Expert Group on Managing Conflicts of Interest (comparative analysis and information sharing)
Other Inter-governmental Integrity Instruments				
10. FATF Rec.	Money laundering (public and private corruption being considered a predicate offence in most countries)	1990, revised in 1996	OECD member countries – Czech Republic, Hungary, South Korea, Poland and Slovak Republic + Argentina, Brazil, Hong Kong China, Singapore + European Commission + Gulf Co-operation Council	FATF (peer review monitoring mechanism)
11. Inter-American Convention against Corruption	Public corruption	March 1996; Entered into force in March 1997	Argentina, The Bahamas, Belize, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, the Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Guyana, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Saint Lucia, Saint Vincent and the Grenadines, Suriname, Trinidad and Tobago, the United States, Uruguay and Venezuela. (Barbados and Haiti have signed but not ratified yet.)	Committee of Experts of the Mechanism for Follow-up on the Implementation of the Inter-American Convention against Corruption (peer review follow-up mechanism)
12. EU Convention on the Fight against Corruption	Public corruption	May 1997; Not entered into force yet	Austria, Belgium, Denmark, Finland, Germany, Greece, France, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden and the United Kingdom (underlined: countries that have ratified)	Council of the European Union

13. Council of Europe Criminal Law Convention on Corruption	Public and private corruption	January 1999; Entered into force in September 2002	Albania, Andorra, Austria, Belarus, Belgium, Bosnia-and-Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Mexico, Moldova, Netherlands, Norway, Poland, Portugal, Romania, Russia, Serbia and Montenegro, Slovakia, Slovenia, Sweden, Switzerland, the Former Yugoslav Republic of Macedonia, Turkey, Ukraine, United Kingdom and the United States (underlined: countries that have ratified)	The Group of States against Corruption (GRECO) monitors the observance of the Guiding Principles in the Fight against Corruption (peer review monitoring mechanism) and, in the future, the implementation of the international legal instruments adopted in pursuit of the Programme of Action against Corruption, including the Criminal Law Convention (for those countries who will have ratified).
14. Council of Europe Civil Law Convention on Corruption	Public and private corruption	September 1999; Not entered into force yet	Albania, Andorra, Austria, Belgium, Bosnia-and-Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Lithuania, Luxembourg, Malta, Moldova, Norway, Poland, Romania, Slovakia, Slovenia, Sweden, the Former Yugoslav Republic of Macedonia, Turkey, Ukraine, United Kingdom (underlined: countries that have ratified)	The Group of States against Corruption (GRECO) monitors the observance of the Guiding Principles in the Fight against Corruption (peer review monitoring mechanism) and, in the future, the implementation of the international legal instruments adopted in pursuit of the Programme of Action against Corruption, including the Civil Law Convention (for those countries who will have ratified).
15. Southern African Development Community Protocol on Corruption	Public and private corruption	August 2001	Angola, Botswana, the Democratic Republic of Congo, Lesotho, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe	Committee for the implementation of the Protocol (self-assessment reports and information sharing)
16. UN Draft Convention against Corruption	Public and private corruption	*Under negotiation*	-	*To be determined* - Ad Hoc Committee for the Negotiation of a Convention against Corruption

II. The Anti-Bribery Content of the OECD Guidelines for Multinationals, in Perspective with OECD Instruments and Other Major Inter-Governmental Instruments

The OECD Guidelines inter alia provide recommendations to multinational enterprises on what they should do to contribute to the fight against corruption. One of the ten chapters of the Guidelines, Chapter VI, focuses on bribery. Complementary elements can be found in two other chapters: Chapter II on General Policies and Chapter III on Disclosure.

A first sub-part presents the anti-bribery contents of the text of the Guidelines, in comparison with the Convention and the Revised Recommendation. A second sub-part compares with other international instruments.

II.1 - The anti-bribery contents of the Guidelines, in comparison with the Revised Recommendation and the Convention

A broad anti-bribery scope

The introductory sentence of the sixth chapter, on bribery, states:

> *"Enterprises should not, directly or indirectly, offer, promise, give, or demand a bribe or other undue advantage to obtain or retain business or other improper advantage."*

As the identity of the other party involved in the bribery act is not specified, this party can therefore be a public official, a business person or a political party official. The anti-bribery scope of the Guidelines is therefore potentially broader than that of the Revised Recommendation and of the Convention. These two instruments apply to the active side of bribery of foreign public officials, whereas the Guidelines potentially cover public sector bribery[9], bribery involving political party officials as well as both the active and passive sides of private sector bribery (bribery transactions between private individuals or entities). As in the 1997 Revised Recommendation, the Guidelines do not cover bribery practices which are not for obtaining or retaining business or other improper advantage: this means that facilitation payments are excluded.

Paragraphs 1 and 2 illustrate in more practical terms the general normative statement against bribery practices. These developments are particularly useful for business readers as they help clarify what is meant by combating bribery.

> *"In particular, enterprises should:*
>
> *1. Not offer, nor give in to demands, to pay public officials or the employees of business partners any portion of a contract payment. They should not use sub-contracts, purchase orders or consulting agreements as means of channelling payments to public officials, to employees of business partners or to their relatives or business associates.*
>
> *2. Ensure that remuneration of agents is appropriate and for legitimate services only."*

Chapter II states general principles that support the contents of the chapter on bribery. For instance, Chapter II states that companies should "refrain from seeking or accepting exemptions not contemplated in the statutory or regulatory framework (…)", which is consistent with the avoidance of situations potentially conducive to corruption acts[10].

Solicitation of bribes and extortion[11]

If the issue of solicitation is mentioned in its preamble, the 1997 OECD Convention is exclusively aimed at criminalising the "supply" of bribes to foreign public officials. Solicitation and extortion fall outside of the scope of application of the Convention. The Working Group on Bribery organised in June and October 1999 two informal meetings with the private sector on solicitation[12]. The purpose of the meeting was to consider whether governments should undertake actions to assist and support the private sector's fight against solicitation and, if so, what actions would be most appropriate in the framework of the OECD.

One of the conclusions of the June meeting was that the revised version of the Guidelines could provide the opportunity to give more prominence to the issues of bribe solicitation and extortion. Several references have thus been inserted in the Guidelines. The second sentence of the chapter on bribery: "Nor should enterprises be solicited or expected to render a bribe or other undue advantage" reflects the business community's concern about the problems of the solicitation and extortion of bribes by public officials[13]. Paragraph 45 of the Commentary on the Guidelines reinforces this statement, by saying that "governments should assist companies confronted with solicitation of bribes." The recommendations made to companies in the rest of the chapter target both the fight against bribery and that of extortion (Cf. for instance paragraph 3: "their activities in the fight against bribery and extortion").

Recommendations to multinationals

Recommendations of measures companies should take to fight against bribery and extortion are made in paragraphs 2, 3, 4 and 5 of Chapter VI and in Chapters II and III. It includes the development of activities specifically targeting bribery and extortion, with training programmes and disciplinary procedures to ensure the adherence of the staff, and a proper remuneration of agents.

The Guidelines (Paragraph VI.3 and III.5) also stress the importance of adopting a policy of transparency on these activities and of external communication more generally. This reflects well the fact that non-governmental organisations are an indispensable partner in facilitating co-ordination between the public and the private sector and in helping to build effective coalitions.

The Guidelines recommend the adoption of adequate control systems, accounting and auditing practices. The Convention (Article 8: "Accounting"), the Revised Recommendation and the Principles of Corporate Governance (Section IV: "Disclosure and Transparency") also include requirements or recommendations on accounting standards and auditing practices. For each of these instruments, the terms used slightly differ. For instance, the Revised Recommendation calls for "internal company controls, with monitoring bodies independent of management", whereas the Guidelines call for the adoption of "management control systems", without specifying whether these should be under the supervision of a independent body or of the CEO. The Guidelines specifically mention the need to disclose contributions to political parties, issue which falls outside of the scope of the Revised Recommendation and of the Convention. On the other hand, the Revised Recommendation addresses, in a quite detailed manner, the issue of external audit, which the Guidelines do not cover, except indirectly through references in the Commentary to ICC's work and in general terms in the Preface.

Paragraph 9 of Chapter II, General Policies, adds the important element of non-discrimination against "employees who make *bona fide* reports to management or as appropriate, to the competent public authorities, on practices that contravene the law, the Guidelines or the enterprise's policies". This is consistent with the emphasis given by BIAC and TUAC to the need to protect whistle-blowers, i.e. the employees who expose corruption in organisations, as these may suffer victimisation.

Subsidiaries and other business partners

The Negotiating Conference of the 1997 OECD Convention noted that further work was needed on a number of issues, including on the role of foreign subsidiaries in bribery transactions. Members of the Working Group on Bribery share the view of the crucial importance of this subject for the effective implementation of the Convention[14].

The Guidelines target a broad application of the principles and recommendations against bribery and extortion, encompassing business partners. Paragraph 10 of Chapter II states that enterprises should "encourage, where practicable, business partners, including suppliers and subs-contractors, to apply principles of corporate conduct compatible with the Guidelines." The Commentary (paragraph 10) gives further indications on this issue.

Table 2 gives a synthetic overview of the anti-bribery contents of the Guidelines, in comparison with the Revised Recommendation and the Convention.

Table 2. Comparing the Guidelines with the Convention and the Revised Recommendation

	GUIDELINES Enterprises should:	**CONVENTION** Each Party shall:	**REVISED RECOMMENDATION** Member countries should:
Scope			
Private sector bribery	*Covered*	*Out of scope*	*Out of scope*
Solicitation of bribes and extortion	*Covered*	*Out of scope*	*Out of scope*
Bribery of candidates for public office or to political parties	*Covered* Contributions should fully comply with public disclosure requirements and should be reported to senior management.	*Partially covered – further discussion in the Five Issues*	*Partially covered – further discussion in the Five Issues*
Business partners	*Covered*	*Partially covered – further discussion in the Five Issues (subsidiaries)*	*Partially covered – further discussion in the Five Issues (subsidiaries)*
Measures to be taken by companies			
Standards of conduct	*Implied*: role of the Guidelines	-	Encourage the development and adoption of (…) standards of conduct.
Internal communication, training and disciplinary procedures	Promote employee awareness of and compliance with company policies against bribery and extortion through appropriate dissemination of these policies and through training programmes and disciplinary procedures.	-	-
Employment of agents	Ensure that remuneration of agents is appropriate and for legitimate services only. Where relevant, a list of agents employed in connection with transactions with public bodies and state-owned enterprises should be kept and made available to competent authorities.	-	-

External communication	- Enhance the transparency of their activities in the fight against bribery and extortion. Measures could include making public commitments against bribery and extortion and disclosing management systems the company has adopted in order to honour these commitments. - Foster openness and dialogue with the public so as to promote its awareness of and co-operation with the fight against bribery and extortion.	-	Encourage company management to make statements in their annual reports about their internal control mechanisms, including those which contribute to preventing bribery.
Internal control systems	Adopt management control systems that discourage bribery and corrupt practices	-	- Encourage the development and adoption of adequate internal company controls, including standards of conduct. - Encourage the creation of monitoring bodies, independent of management, such as audit committees of boards of directors or of supervisory boards.
Accounting practices	Adopt financial and tax accounting and auditing practices that prevent the establishment of "off the books" or secret accounts or the creation of documents which do not properly and fairly record the transactions to which they relate.	- Take such measures as may be necessary, within the framework of its laws and regulations regarding the maintenance of books and records, financial statements disclosures, and accounting and auditing standards, to prohibit the establishment of off-the-books accounts, the making of off-the-book accounts or inadequately identified transactions, the recording of non-existent expenditures, the entry of liabilities with incorrect identification of their object, as well as the use of false documents, by companies subject to those laws and regulations, for the purpose of bribing foreign public officials or of hiding such bribery. - Provide effective, proportionate and dissuasive civil, administrative or criminal penalties for such omissions and falsifications in respect of the books, records, accounts and financial statements of such companies.	Adequate accounting requirements: - Require companies to maintain adequate records of the sums of money received and expended by the company, identifying the matters in respect of which the receipt and expenditure takes place. Companies should be prohibited from making off-the-books transactions or keeping off-the-books accounts. - Require companies to disclose in their financial statements the full range of material contingent liabilities. - Adequately sanction accounting omissions, falsifications and fraud.

External audit		-	Independent external audit: - Consider whether requirements to submit to external audit are adequate. - [professional associations] Maintain adequate standards to ensure the independence of external auditors which permits them to provide an objective assessment of company accounts, financial statements and internal controls. - Require the auditor who discovers indications of possible illegal act of bribery to report this discovery to management and, as appropriate, to corporate monitoring bodies. - Consider requiring the auditor to report indications of a possible illegal act of bribery to competent authorities.
Whistle-blowing	Refrain from discriminatory or disciplinary action against employees who make *bona fide* reports to management or, as appropriate, to the competent public authorities, on practices that contravene the law, the Guidelines or the enterprise's policies.	-	Encourage companies to provide channels for communication by, and protection for, persons not willing to violate professional standards or ethics under instructions or pressure from hierarchical superiors.

II.2 Comparing with other inter-governmental instruments

To complement this comparison, it is interesting to review the provisions of other anti-corruption inter-governmental instruments regarding what multinational enterprises should do to prevent bribery. Table 3 shows whether the recommendations made in the Guidelines are echoed by five major non-OECD anti-corruption instruments.

Table 3. What Other Inter-Governmental Anti-Corruption Instruments Recommend Companies Should Do to Prevent Corruption?

Anti-corruption instruments / Issues addressed	OECD Guidelines for Multinational Enterprises	Inter-American Convention against Corruption	Council of Europe Criminal Law Convention on Corruption	Council of Europe Civil Law Convention on Corruption	SADC Protocol on Corruption	UN Draft Convention against Corruption
Standards of conduct	Yes					Yes
Internal communication training and disciplinary procedures	Yes					
Employment of agents	Yes					
External communication	Yes					
Internal control systems	Yes	Yes			Yes	Yes
Accounting practices	Yes	Yes	Yes	Yes	Yes	Yes
External audit				Yes		Yes
Whistle-blowing	Yes		Yes	Yes		

Note: A blank means no.

Generally speaking, this shows that several of the practices promoted by the Guidelines are recognised world wide as effective anti-corruption prevention practices (see the Annex for details). The standards they promote cannot be considered to only reflect the perspective of OECD countries. In particular, all instruments converge on the importance of accounting practices in the prevention of bribery.

II.3 The implementation mechanism of the OECD Guidelines for Multinational Enterprises

A policy instrument is much more than a text. Implementation procedures of the Guidelines have been significantly improved.

While the Guidelines' recommendations are addressed to business, governments through their network of National Contact Points (NCP) are responsible for promoting the Guidelines, handling inquiries and helping to resolve issues that arise in specific instances. The Committee on International Investment and Multinational Enterprises remains the responsible body for clarifying the meaning of the Guidelines and overseeing their effectiveness.

Pressure from peer governments and civil society can also contribute to ensure the effectiveness of the Guidelines. The exercise of peer pressure is much more formalised for the implementation of the Convention and of the Revised Recommendation than for the Guidelines. It is indeed the fundamental principle underlying the mechanism adopted to monitor the 1997 instruments.

The network of National Contact Points materialise the commitments made by governments to promote the Guidelines as a model code of conduct. The implementation of the Revised Recommendation is not buttressed by such a public entity in charge of the implementation of this instrument. The fact that NCP are the focus point for several corporate responsibility issues increases their visibility.

III. Major Private Initiatives on Corruption

Several international private sector associations have developed initiatives on corruption. This section presents some of these initiatives, looking in particular at the correspondences with the norms set by the Guidelines. The review is limited to initiatives that aim primarily at promoting preventing measures to be taken by companies in an anti-corruption perspective, as the Guidelines do. This means that initiatives that advocate policy or institutional changes are out of the scope of this paper[15].

III.1 Two major international private sector initiatives

There are two major international private sector initiatives that encourage companies to adopt internal measures to prevent corruption:

- The ICC Rules of Conduct to Combat Extortion and Bribery; and
- The Business Principles for Countering Bribery.

First published in 1977, last revised in 1999, the ICC Rules of Conduct to Combat Extortion and Bribery outline the basic measures companies should take to prevent corruption. The Commentary on the Guidelines (paragraph 46) makes reference to ICC's activity in this field. A Standing Committee on Extortion and Bribery works with the ICC National Committees to promote the use of the Rules of Conduct. This Committee ensures liaison with international organisations active in the anti-corruption field, and stimulates cooperation between governments and the private sector.

More recently, Transparency International and Social Accountability International developed the Business Principles for Countering Bribery. These principles are "a tool to assist enterprises to develop effective approaches to countering bribery in all of their activities". They were designed to "give practical effect to recent initiatives such as the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, the ICC Rules of Conduct to Combat Extortion and Bribery and the anti-bribery provisions of the revised OECD Guidelines for Multinationals." More detailed than the ICC Rules of Conduct, these Business Principles are meant to be used as a starting point for companies wanting to develop their own anti-bribery systems, or as a benchmark.

Table 4 gives an overview of these two initiatives, summarising information the date of their start, their overall purpose and the normative fields they cover. It shows that the recommendations made in the Guidelines are echoed by these private instruments.

It is interesting to see also that these instruments introduce elements that were not addressed by the Guidelines. The ICC Rules of Conduct, for instance, recognises that "under current conditions in some parts of the world, an effective programme against extortion and bribery may have to be implemented in stages". The ICC recommends focusing efforts on ending large-scale bribery involving politicians and senior officials. The Business Principles are also broader than the Guidelines in some respects. For example, they cover facilitation payments and gifts.

III.2 Industry initiatives

Several international industry associations have developed collective initiatives with an anti-corruption component, which are, according to Mark Pieth, Chair of the OECD Working Group on Bribery, called to further develop in the future[16]. The first example is the International Federation of Consulting Engineers (FIDIC), an industry association that represents the international business interests of firms belonging to national member associations of engineering-based consulting companies (see Table 4). To be part of a national member association, firms have to comply with FIDIC's Code of Ethics and Policy Statements, including that on Integrity. This integrity policy statement aims at reducing corruption in aid-funded public procurement from the private sector side. The FIDIC Integrity Policy Statement introduces the notion of evaluation of the measures adopted to prevent corruption. The Statement also includes a number of recommendations tailored to the specificity of the industry.

Another example is the group of 12 leading international banks that have developed the Wolfsberg Anti-Money Laundering Principles, a set of global anti-money-laundering guidelines for international private banks (issues covered include: guidelines for client acceptance, practices when identifying unusual or suspicious activities, monitoring, control responsibilities and reporting, etc.). The banks collaborated with a team from Transparency International who invited two international experts to participate, including Prof. Mark Pieth, Chairman of the OECD Working Group on Bribery. These Principles do not deal with the issues of corruption directly, but contribute by raising the risks of exposure for the corrupt, by curbing money laundering.

Table 4. Three Major Private Initiatives that Promote Anti-Bribery Programmes for Companies in Perspective with the OECD Guidelines for Multinational Enterprises

	OECD Guidelines for Multinational Enterprises	**ICC Rules of Conduct to Combat Extortion and Bribery**	**Business Principles for Countering Bribery**	**FIDIC Code of Ethics and Integrity Policy Statement**
Developed by	OECD	The International Chamber of Commerce	Transparency International and Social Accountability International	The International Federation of Consulting Engineers
Date	2000	(1977, 1996) 1999	2002	
Broad purpose	To promote responsible business conduct	To encourage companies to adopt corruption prevention measures	To help companies develop their anti-bribery systems	To provide consulting services that are not biased by corruption
Implementation mechanism (principles)	OECD Committee on International Investment and Multinational Enterprises and the National Contact Points	Standing Committee on Extortion and Bribery, National Committees (promotion, information sharing, policy dialogue)	Steering Committee	FIDIC (disciplinary actions against members found to have violated the FIDIC Code of Ethics)
Issues covered				
Solicitation of bribes and extortion	Yes			
Standards of conduct	Yes	Yes	Yes	Yes
Internal communication, training and disciplinary measures	Yes	Yes	Yes	Yes
Employment of agents	Yes	Yes	Yes	
External communication	Yes		Yes	
Internal control systems	Yes	Yes	Yes	Yes
Accounting practices	Yes	Yes	Yes	
External audit		Yes	Yes	
Disclosure of contributions to political parties	Yes	Yes	Yes	
Whistle-blowing	Yes		Yes	
Others		Allows for implementation in stages.	Broad scope, covering all business relationships.	Evaluation of the Business Integrity Management System, measures specific to the industry.

Note: A blank means no.

Yet another example is the International Association of Oil and Gas Producers (OGP), a worldwide association of oil and gas companies involved in exploration and production. The members include private and state-owned oil and gas companies, national associations and petroleum institutes. OGP recently defined its position on transparency: OGP is "in favour of transparency and opposes corruption in any form. [OGP is] committed to honest, legal and ethical behaviour in all [their] activities, wherever [they] operate". Furthermore, "OGP is committed to working with multilateral institutions, regulatory bodies and other appropriate parties in their efforts to reduce corruption and maximise transparency".

Leading companies from around the world in the mining and mineral industry set up the International Council on Mining and Metals (ICMM) to develop their industry's role in the transition to sustainable development. The ICMM adopted a Sustainable Development Charter, which expresses the commitment of its members to principles of sustainable development, in four key areas: Environmental Stewardship; Product Stewardship; Community Responsibility and General Corporate Responsibilities. This Charter includes a commitment to contribute to the fight against corruption: members commit to "adhere to ethical business practices and, in doing so, contribute to the elimination of corruption and bribery, to increased transparency in government-business relations (…)".

III.3 Other private initiatives

Other associations have set up anti-corruption initiatives with different purposes. For example, TRACE (Transparent Agents and Contracting Entities) is an international non-profit membership organization working to reduce corruption in transactions involving business intermediaries. It provides a mechanism that helps select business intermediaries who commit voluntarily, publicly and decisively to greater transparency and ethical business practices. TRACE prepares extensive background reports on member intermediaries to the highest standard internationally and makes them available to companies requesting them. It also helps provides anti-corruption training to intermediaries on their own anti-bribery laws and on international standards. This initiative contributes to the creation of standards for the use of agents.

Another example is UNICORN, which is a trade union anti-corruption network. Its overall mission is to mobilise workers to share information and coordinate action to combat international corruption. It is a joint initiative of TUAC, the International Confederation of Free Trade Unions and Public Services International. UNICORN is undertaking empirical research into the corrupt practices of multinational enterprises, particularly in the context of privatisation and public procurement. It is also undertaking policy research on a range of initiatives aimed at detecting and deterring international bribery.

ANNEX

Corruption Prevention Measures Recommended to Companies by Five Major International Anti-Corruption Instruments

The Inter-American Convention against Corruption:

Article III: *Preventive measures,* paragraph 10: State parties have agreed "to consider the applicability of measures within their own institutional systems to create, maintain and strengthen:
(…)
10. Deterrents to the bribery of domestic and foreign government officials, such as mechanisms to ensure that publicly held companies and other types of associations maintain books and records which, in reasonable detail, accurately reflect the acquisition and disposition of assets, and have sufficient internal accounting controls to enable their officers to detect corrupt acts."

The Criminal Law Convention on Corruption:

Article 14: *Account offences*: "Each Party shall adopt such legislative and other measures as may be necessary to establish as offences liable to criminal or other sanctions under its domestic law the following acts or omissions, when committed intentionally, in order to commit, conceal or disguise the offences referred to in Articles 2 to 12, to the extent the Party has not made a reservation or a declaration:
a) creating or using an invoice or any other accounting document or record containing false or incomplete information;
b) unlawfully omitting to make record of a payment.

Article 22: *Protection of collaborators of justice and witnesses*: "Each Party shall adopt such measures as may be necessary to provide effective and appropriate protection for:
a) those who report the criminal offences established in accordance with Articles 2 to 14 or otherwise co-operate with the investigating or prosecuting authorities;
b) witnesses who give testimony concerning these offences."

The Civil Law Convention on Corruption:

Article 9: *Protection of employees*: "Each Party shall provide in its internal law for appropriate protection against any unjustified sanction for employees who have reasonable grounds to suspect corruption and who report in good faith their suspicion to responsible persons or authorities."

Article 10: *Accounts and audits*:
"1) Each Party shall, in its internal law, take any necessary measures for the annual accounts of companies to be drawn up clearly and give a true and fair view of the company's financial position.
2) With a view to preventing acts of corruption, each Party shall provide in its internal law for auditors to confirm that the annual accounts present a true and fair view of the company's financial position."

The Southern African Development Community Protocol on Corruption

Article 4: *Preventative measures*: "For the purposes set forth in Article 2 of this Protocol, each State Party undertakes to adopt measures, which will create, maintain and strengthen:
(…)
1.h) deterrents to the bribery of domestic public officials, and officials of foreign States, such as mechanisms to ensure that publicly held companies and other types of associations maintain books and records which, in reasonable details, accurately reflect the acquisition and disposition of assets, and have sufficient internal accounting controls to enable the law enforcement agencies to detect acts of corruption."

The United Nations Convention against Corruption (draft of November 2002):

Article 10: *Funding of political parties*: "Each State Party shall adopt, maintain and strengthen measures and regulations concerning the funding of political parties. Such measures and regulations shall serve:
(…)
(d) To incorporate the concept of transparency into funding of political parties by requiring declaration of donations exceeding a specified limit."

Article 11: *Private sector*: "Each State Party shall endeavour, in accordance with the fundamental principles of its domestic law, to prevent corruption involving the private sector through measures that focus, inter alia, on:
(…)
(b) Promoting the development of standards and procedures designed to safeguard the integrity of relevant private entities, including codes of conduct for the correct, honourable and proper performance of the activities of business and all relevant professions and the prevention of conflicts of interest;
(…)
(d) Promoting transparency among private entities, including, where appropriate, measures regarding the identity of legal and natural persons involved in the establishment and management of corporate entities and of holders of the capital and shares of corporate entities."

Article 12: *Accounting standards for the private sector*:
"1. In order to prevent corruption effectively, each State Party shall take the necessary measures, in accordance with its domestic laws and regulations regarding the maintenance of books and records, financial statement disclosures and accounting and auditing standards, to prohibit the following acts carried out for the purpose of committing any of the offences established in articles […] of this Convention:
(a) The establishment of off-the-books accounts;
(b) The making of off-the-books or inadequately identified transactions;
(c) The recording of non-existent expenditure;
(d) The entry of liabilities with incorrect identification of their objects; and
(e) The use of false documents.
2. Each State Party shall establish effective, proportionate and dissuasive civil, administrative or criminal penalties for the omissions and falsifications referred to in paragraph 1 of this article.
3. Each State Party shall take such measures as may be necessary, in accordance with the fundamental principles of its domestic legal system, to ensure:
(a) That private entities, taking into account their size, have sufficient internal accounting controls to assist in preventing and detecting acts of corruption; and

(b) The accounts and required financial statements of such private entities are subjected to appropriate auditing and certification procedures.”

NOTES

[1] Cf. paragraph 9 in the commentaries on the Convention.

[2] The Convention encompasses the three previous instruments. State Parties to the Convention commit to implement the Revised Recommendation (cf. Commentaries on the Convention, Article 13). Besides, the Revised Recommendation makes reference to both the Recommendation on Tax Deductibility and to the Recommendation on Anti-Corruption in Aid-Funded Procurement. Doing so, it extends their membership to the signatories of the Convention.

[3] This instrument will be considered for approval by the OECD Expert Group on Managing Conflicts of Interest early April 2003.

[4] To be precise, these two recommendations are included in the Revised Recommendation.

[5] This paragraph is inspired by John T. Scholz (1997) "Enforcement Policy and Corporate Misconduct: The Changing Perspective of Deterrence Theory", in *Law and Contemporary Problems*, n. 127.

[6] OECD (2001) *Corporate Responsibility: Private Initiatives and Public Goals* explores the relationship between deterrence and other determinants of companies' decisions to comply with the law or with expectations for business behavior that might be written down in law books.

[7] This box borrows text from the CMI Policy Brief on International Legislation and Conventions on Corruption, December 2002, www.cmi.no

[8] The Southern African Development Community (SADC) is an inter-governmental organisation established in April 1980 by Governments of the nine Southern African countries of Angola, Botswana, Lesotho, Malawi, Mozambique, Swaziland, Tanzania, Zambia and Zimbabwe. This organisation has a Programme of Action, covering several broad economic and social sectors, namely, Energy, Tourism, Environment and Land Management, Water, Mining, Employment and Labour, Culture, Information and Sport and Transport and Communications. Other sectors are Finance and Investment, Human Resource Development, Food, Agriculture and Natural Resources, Legal Affairs and Health.

[9] Theoretically both domestic and international public bribery, as the other party involved in the bribery act can be a public official, a business person or a political party official, from a foreign country or from the same country as the enterprise's country of origin.

[10] Links can be made between the following paragraphs: II. 5 and the chapeau of Chapter VI; II.6 and VI.5; II.7 and VI.3 and VI.5; II.8 and VI.4; II.11 and VI.6.

[11] The solicitation of bribes is the act of asking or enticing another to commit bribery. It becomes extortion when this demand is accompanied by threats that endanger the personal integrity or the life of the private actors involved. The threat to refuse a due investment license or to tear down a plant's buildings for instance cannot be considered as creating a situation of extortion.

[12] See DAFFE/IME/BR(99)15 and DAFFE/IME/BR(99) 34.

[13] Cf. December 1999 Statement of the BIAC MNEs Committee – Task Force on Bribery and Corruption: www.biac.org.

[14] See DAFFE/IME/BR(98)13/REV1.

[15] For more information on these two approaches of business action, see I. Hors (2000) "Fighting Corruption in Developing Countries and Emerging Economies: The Role of the Private Sector", OECD Development Centre.

[16] See Gemma Aiolfi and Mark Pieth (March 2002) "How to Make a Convention Work: the OECD Recommendation and Convention on Bribery as an Example of a New Horizon in International Law", DAFFE/IME/BR/WD(2002)4.

ANNEXURE C

Department of Labour

REPUBLIC OF SOUTH AFRICA

Employment Equity Act, No. 55 Of 1998

ACT

To provide for employment equity; and to provide for matters incidental thereto.

Recognising-

- that as a result of apartheid and other discriminatory laws and practices, there are disparities in employment, occupation and income within the national labour market; and
- that those disparities create such pronounced disadvantages for certain categories of people that they cannot be redressed simply by repealing discriminatory laws,

Therefore, in order to-

- promote the constitutional right of equality and the exercise of true democracy;
- eliminate unfair discrimination in employment;
- ensure the implementation of employment equity to redress the effects of discrimination;
- achieve a diverse workforce broadly representative of our people;
- promote economic development and efficiency in the workforce; and
- give effect to the obligations of the Republic as a member of the International Labour Organisation,

BE IT ENACTED by the State President and the Parliament of the Republic of South Africa, as follows:-

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Department of Labour

Department of Labour

CHAPTER 1

Definitions, purpose, interpretation and application

1. Definitions

In this Act, unless the context otherwise indicates-

"**Basic Conditions of Employment Act**" means the Basic Conditions of Employment Act, 1997 (Act No. 75 of 1997);

"**black people**" is a generic term which means Africans, Coloureds and Indians;

"**CCMA**" means the Commission for Conciliation, Mediation and Arbitration, established by section 112 of the Labour Relations Act;

"**code of good practice**" means a document issued by the Minister in terms of section 54;

"**collective agreement**" means a written agreement concerning terms and conditions of employment or any other matter of mutual interest concluded by one or more registered trade unions, on the one hand and, on the other hand-

(a) one or more employers;

(b) one or more registered employers' organisations; or

(c) one or more employers and one or more registered employers' organisations;

"**Commission**" means the Commission for Employment Equity, established by section 28;

"**Constitution**" means the Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996);

"**designated employer**" means-

(a) a person who employs 50 or more employees;

(b) a person who employs fewer than 50 employees but has a total annual turnover that is equal to or above the applicable annual turnover of a small business in terms of the Schedule 4 of this Act;

(c) a municipality, as referred to in Chapter 7 of the Constitution;

(d) an organ of state as defined in section 239 of the Constitution, but excluding local spheres of government, the National Defence Force, the National Intelligence Agency and the South African Secret Service; and

(e) an employer bound by collective agreement in terms of section 23 or 31 of the Labour Relations Act, which appoints it as a designated employer in terms of this Act, to the extent provided for in the agreement.

"**designated groups**" means black people, women and people with disabilities;

"**Director-General**" means the Director-General of the Department of Labour;

"**dismissal**" has the meaning assigned to it in section 186 of the Labour Relations Act;

"**dispute**" includes an alleged dispute;

"**employee**" means any person other than an independent contractor who-

(a) works for another person or for the State and who receives, or is entitled to receive, any remuneration; and

(b) in any manner assists in carrying on or conducting the business of an employer,

and "**employed**" and "**employment**" have corresponding meanings;

"**employment law**" means any provision of this Act or any of the following Acts:

(a) The Unemployment Insurance Act, 1966 (Act No. 30 of 1966);

(b) the Guidance and Placement Act, 1981 (Act No. 62 of 1981);

(c) the Manpower Training Act, 1981 (Act No. 56 of 1981);

(d) the Occupational Health and Safety Act, 1993 (Act No. 85 of 1993);

(e) the Compensation for Occupational Injuries and Diseases Act, 1993 (Act No. 130 of 1993);

(f) the Labour Relations Act, 1995 (Act No. 66 of 1995);

(g) the Basic Conditions of Employment Act, 1997 (Act No. 75 of 1997);

(h) any other Act, whose administration has been assigned to the Minister.

"**employment policy or practice**" includes, but is not limited to-

(a) recruitment procedures, advertising and selection criteria;

(b) appointments and the appointment process;

(c) job classification and grading;

(d) remuneration, employment benefits and terms and conditions of employment;

(e) job assignments;

(f) the working environment and facilities;

(g) training and development;

(h) performance evaluation systems;

(i) promotion;

(j) transfer;

(k) demotion;

(l) disciplinary measures other than dismissal; and

(m) dismissal.

"**family responsibility**" means the responsibility of employees in relation to their spouse or partner, their dependant children or other members of their immediate family who need their care or support;

"**HIV**" means the Human Immunodeficiency Virus;

"**labour inspector**" means a person appointed in terms of section 65 of the Basic Conditions of Employment Act;

"**Labour Relations Act**" means the Labour Relations Act, 1995 (Act No. 66 of 1995);

"**medical testing**" includes any test, question, inquiry or other means designed to ascertain, or which has the effect of enabling the employer to ascertain, whether an employee has any medical condition;

"**Minister**" means the Minister of Labour;

"**NEDLAC**" means the National Economic, Development and Labour Council established by section 2 of the National Economic, Development and Labour Council Act, 1994 (Act No. 35 of 1994);

"**organ of state**" means an organ of state as defined in section 239 of the Constitution;

"**people with disabilities**" means people who have a long-term or recurring physical or mental impairment which substantially limits their prospects of entry into, or advancement in, employment;

"**pregnancy**" includes intended pregnancy, termination of pregnancy and any medical circumstances related to pregnancy;

"**prescribed**" means prescribed by a regulation made under section 55;

"**public service**" means the public service referred to in section 1 (1) of the Public Service Act, 1994 (promulgated by Proclamation No. 103 of 1994), and includes any organisational component contemplated in section 7 (4) of that Act and specified in the first column of Schedule 2 to that Act, but excluding-

(a) the National Defence Force;

(b) the National Intelligence Agency; and

(c) the South African Secret Service.

"**reasonable accommodation**" means any modification or adjustment to a job or to the working environment that will enable a person from a designated group to have access to or participate or advance in employment;

"**registered employers' organisation**" means an employers' organisation as defined in section 213 of the Labour Relations Act and registered in terms of section 96 of that Act;

"**registered trade union**" means a trade union as defined in section 213 of the Labour Relations Act and registered in terms of section 96 of that Act;

"**remuneration**" means any payment in money or in kind, or both in money and in kind, made or owing to any person in return for that person working for any other person, including the State;

"**representative trade union**" means a registered trade union, or two or more registered trade unions acting jointly, that are sufficiently representative of the employees employed by an employer in a workplace;

"**Republic**" means the Republic of South Africa as defined in the Constitution;

"**serve**" or "**submit**", in relation to any communication, means either-

(a) to send it in writing delivered by hand or registered post; or

(b) to transmit it using any electronic mechanism as a result of which the recipient is capable of printing the communication;

"**suitably qualified person**" means a person contemplated in sections 20 (3) and (4);

"**this Act**" includes any regulations made under section 55, but excludes any footnote;

"**trade union representative**" means a member of a registered trade union who is elected to represent employees in a workplace;

"**workplace forum**" means a workplace forum established in terms of Chapter V of the Labour Relations Act.

2. Purpose of this Act

The purpose of this Act is to achieve equity in the workplace by-

(a) promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination; and

(b) implementing affirmative action measures to redress the disadvantages in employment experienced by designated groups, in order to ensure their equitable representation in all occupational categories and levels in the workforce.

3. Interpretation of this Act

This Act must be interpreted-

(a) in compliance with the Constitution;

(b) so as to give effect to its purpose;

(c) taking into account any relevant code of good practice issued in terms of this Act or any other employment law; and

(d) in compliance with the international law obligations of the Republic, in particular those contained in the International Labour Organisation Convention (No. 111) concerning Discrimination in Respect of Employment and Occupation.

4. Application of this Act

(1) Chapter II of this Act applies to all employees and employers.

(2) Except where Chapter III provides otherwise, Chapter III of this Act applies only to designated employers and people from designated groups.

(3) This Act does not apply to members of the National Defence Force, the National Intelligence Agency, or the South African Secret Service1.

CHAPTER 2

Prohibition of unfair discrimination

5. Elimination of unfair discrimination

Every employer must take steps to promote equal opportunity in the workplace by eliminating unfair discrimination in any employment policy or practice.

6. Prohibition of unfair discrimination

(1) No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth.

(2) It is not unfair discrimination to-

(a) take affirmative action measures consistent with the purpose of this Act; or

(b) distinguish, exclude or prefer any person on the basis of an inherent requirement of a job.

(3) Harassment of an employee is a form of unfair discrimination and is prohibited on any one, or a combination of grounds of unfair discrimination listed in subsection (1).

7. Medical testing

1. Medical testing of an employee is prohibited, unless-

(a) legislation permits or requires the testing; or

(b) it is justifiable in the light of medical facts, employment conditions, social policy, the fair distribution of employee benefits or the inherent requirements of a job.

2. Testing of an employee to determine that employee's HIV status is prohibited unless such testing is determined justifiable by the Labour Court in terms of section 50 (4) of this Act.

8. Psychometric testing

Psychometric testing and other similar assessments of an employee are prohibited unless the test or assessment being used-

(a) has been scientifically shown to be valid and reliable;

(b) can be applied fairly to employees; and

(c) is not biased against any employee or group.

9. Applicants

For purposes of sections 6, 7 and 8, "employee" includes an applicant for employment.

10. Disputes concerning this Chapter

(1) In this section, the word "dispute" excludes a dispute about an unfair dismissal, which must be referred to the appropriate body for conciliation and arbitration or adjudication in terms of Chapter VIII of the Labour Relations Act.

(2) Any party to a dispute concerning this Chapter may refer the dispute in writing to the CCMA within six months after the act or omission that allegedly constitutes unfair discrimination.

(3) The CCMA may at any time permit a party that shows good cause to refer a dispute after the relevant time limit set out in subsection (2).

(4) The party that refers a dispute must satisfy the CCMA that-

(a) a copy of the referral has been served on every other party to the dispute; and

(b) the referring party has made a reasonable attempt to resolve the dispute.

(5) The CCMA must attempt to resolve the dispute through conciliation.

(6) If the dispute remains unresolved after conciliation-

(a) any party to the dispute may refer it to the Labour Court for adjudication; or

(b) all the parties to the dispute may consent to arbitration of the dispute.

(7) The relevant provisions of Parts C and D of Chapter VII of the Labour Relations Act, with the changes required by context, apply in respect of a dispute in terms of this Chapter.

11. Burden of proof

Whenever unfair discrimination[2] is alleged in terms of this Act, the employer against whom the allegation is made must establish that it is fair.

CHAPTER 3

Affirmative action

12. Application of this Chapter

Except where otherwise provided, this Chapter applies only to designated employers.

13. Duties of designated employers

(1) Every designated employer must, in order to achieve employment equity, implement affirmative action measures for people from designated groups in terms of this Act.

(2) A designated employer must--

(a) consult with its employees as required by section 16;

(b) conduct an analysis as required by section 19;

(c) prepare an employment equity plan as required by section 20; and

(d) report to the Director-General on progress made in implementing its employment equity plan, as required by section 21.

14. Voluntary compliance with this Chapter

An employer that is not a designated employer may notify the Director-General that it intends to comply with this Chapter as if it were a designated employer.

15. Affirmative action measures

(1) Affirmative action measures are measures designed to ensure that suitably qualified people from designated groups have equal employment opportunities and are equitably represented in all occupational categories and levels in the workforce of a designated employer.

(2) Affirmative action measures implemented by a designated employer must include-

(a) measures to identify and eliminate employment barriers, including unfair discrimination, which adversely affect people from designated groups;

(b) measures designed to further diversity in the workplace based on equal dignity and respect of all people;

(c) making reasonable accommodation for people from designated groups in order to ensure that they enjoy equal opportunities and are equitably represented in the workforce of a designated employer;

(d) subject to subsection (3), measures to-

(i) ensure the equitable representation of suitably qualified people from designated groups in all occupational categories and levels in the workforce; and

(ii) retain and develop people from designated groups and to implement appropriate training measures, including measures in terms of an Act of Parliament providing for skills development.

(3) The measures referred to in subsection (2) (d) include preferential treatment and numerical goals, but exclude quotas.

(4) Subject to section 42, nothing in this section requires a designated employer to take any decision concerning an employment policy or practice that would establish an absolute barrier to the prospective or continued employment or advancement of people who are not from designated groups.

16. Consultation with employees

(1) A designated employer must take reasonable steps to consult and attempt to reach agreement on the matters referred to in section 17-

(a) with a representative trade union representing members at the workplace and its employees or representatives nominated by them; or

(b) if no representative trade union represents members at the workplace, with its employees or representatives nominated by them.

(2) The employees or their nominated representatives with whom an employer consults in terms of subsection (1) (a) and (b), taken as a whole, must reflect the interests of-

(a) employees from across all occupational categories and levels of the employer's workforce;

(b) employees from designated groups; and

(c) employees who are not from designated groups.

(3) This section does not affect the obligation of any designated employer in terms of section 86 of the Labour Relations Act to consult and reach consensus with a workplace forum on any of the matters referred to in section 17 of this Act.

17. Matters for consultation

A designated employer must consult the parties referred to in section 16 concerning-

(a) the conduct of the analysis referred to in section 19;

(b) the preparation and implementation of the employment equity plan referred to in section 20; and

(c) a report referred to in section 21.

18. Disclosure of information

(1) When a designated employer engages in consultation in terms of this Chapter, that employer must disclose to the consulting parties all relevant information that will allow those parties to consult effectively.

(2) Unless this Act provides otherwise, the provisions of section 163 of the Labour Relations Act, with the changes required by context, apply to disclosure of information.

19. Analysis

(1) A designated employer must collect information and conduct an analysis, as prescribed, of its employment policies, practices, procedures and the working environment, in order to identify employment barriers which adversely affect people from designated groups.

(2) An analysis conducted in terms of subsection (1) must include a profile, as prescribed, of the designated employer's workforce within each occupational category and level in order to determine the degree of underrepresentation of people from designated groups in various occupational categories and levels in that employer's workforce.

20. Employment equity plan

(1) A designated employer must prepare and implement an employment equity plan which will achieve reasonable progress towards employment equity in that employer's workforce.

(2) An employment equity plan prepared in terms of subsection (1) must state-

(a) the objectives to be achieved for each year of the plan;

(b) the affirmative action measures to be implemented as required by section 15 (2);

(c) where underrepresentation of people from designated groups has been identified by the analysis, the numerical goals[4] to achieve the equitable representation of suitably qualified people from designated groups within each occupational category and level in the workforce, the timetable

within which this is to be achieved, and the strategies intended to achieve those goals;

(d) the timetable for each year of the plan for the achievement of goals and objectives other than numerical goals;

(e) the duration of the plan, which may not be shorter than one year or longer than five years;

(f) the procedures that will be used to monitor and evaluate the implementation of the plan and whether reasonable progress is being made towards implementing employment equity;

(g) the internal procedures to resolve any dispute about the interpretation or implementation of the plan;

(h) the persons in the workforce, including senior managers, responsible for monitoring and implementing the plan; and

(i) any other prescribed matter.

(3) For purposes of this Act, a person may be suitably qualified for a job as a result of any one of, or any combination of that person's-

(a) formal qualifications;

(b) prior learning;

(c) relevant experience; or

(d) capacity to acquire, within a reasonable time, the ability to do the job.

(4) When determining whether a person is suitably qualified for a job, an employer must-

(a) review all the factors listed in subsection (3); and

(b) determine whether that person has the ability to do the job in terms of any one of, or any combination of those factors.

(5) In making a determination under subsection (4), an employer may not unfairly discriminate against a person solely on the grounds of that person's lack of relevant experience.

(6) An employment equity plan may contain any other measures that are consistent with the purposes of this Act.

21. Report[5]

(1) A designated employer that employs fewer than 150 employees must-

(a) submit its first report to the Director-General within 12 months after the commencement of this Act or, if later, within 12 months after the date on which that employer became a designated employer; and

(b) thereafter, submit a report to the Director-General once every two years, on the first working day of October.

(2) A designated employer that employs 150 or more employees must-

(a) submit its first report to the Director-General within six months after the commencement of this Act or, if later, within six months after the date on which that employer became a designated employer; and

(b) thereafter, submit a report to the Director-General once every year on the first working day of October.

(3) Despite subsections (1) and (2), a designated employer that submits its first report in the 12-month period preceding the first working day of October, should only submit its second report on the first working day of October in the following year.

(4) The reports referred to in subsections (1) and (2) must contain the prescribed information and must be signed by the chief executive officer of the designated employer.

(5) An employer who becomes a designated employer in terms of the Act must-

(a) report as contemplated in this section for the duration of its current employment equity plan; and

(b) notify the Director-General in writing if it is unable to report as contemplated in this section, and give reasons therefor.

(6) Every report prepared in terms of this section is a public document.

22. Publication of report

(1) Every designated employer that is a public company must publish a summary of a report required by section 21 in that employer's annual financial report.

(2) When a designated employer within any organ of state has produced a report in terms of section 21, the Minister responsible for that employer must table that report in Parliament.

23. Successive employment equity plans

Before the end of the term of its current employment equity plan, a designated employer must prepare a subsequent employment equity plan.

24. Designated employer must assign manager

(1) Every designated employer must-

(a) assign one or more senior managers to take responsibility for monitoring and implementing an employment equity plan;

(b) provide the managers with the authority and means to perform their functions; and

(c) take reasonable steps to ensure that the managers perform their functions.

(2) The assignment of responsibility to a manager in terms of subsection (1) does not relieve the designated employer of any duty imposed by this Act or any other law.

25. Duty to inform

(1) An employer must display at the workplace where it can be read by employees a notice in the prescribed form, informing them about the provisions of this Act [6].

(2) A designated employer must, in each of its workplaces, place in prominent places that are accessible to all employees-

(a) the most recent report submitted by that employer to the Director-General;

(b) any compliance order, arbitration award or order of the Labour Court concerning the provisions of this Act in relation to that employer; and

(c) any other document concerning this Act as may be prescribed.

(3) An employer who has an employment equity plan, must make a copy of the plan available to its employees for copying and consultation.

26. Duty to keep records

An employer must establish and, for the prescribed period, maintain records in respect of its workforce, its employment equity plan and any other records relevant to its compliance with this Act.

27. Income differentials

(1) Every designated employer, when reporting in terms of section 21 (1) and (2), must submit a statement, as prescribed, to the Employment Conditions of Commission established by section 59 of the Basic Conditions of Employment Act, on the remuneration and benefits received in each occupational

category and level of that employer's workforce.

(2) Where disproportionate income differentials are reflected in the statement contemplated in subsection (1), a designated employer must take measures to progressively reduce such differentials subject to guidance as may be given by the Minister as contemplated in subsection (4).

(3) The measures referred to in subsection (2) may include-

(a) collective bargaining;

(b) compliance with sectoral determinations made by the Minister in terms of section 51 of the Basic Conditions of Employment Act;

(c) applying the norms and benchmarks set by the Employment Conditions Commission;

(d) relevant measures contained in skills development legislation;

(4) The Employment Conditions Commission must research and investigate norms and benchmarks for proportionate income differentials and advise the Minister on appropriate measures for reducing disproportional differentials.

(5) The Employment Conditions Commission may not disclose any information pertaining to individual employees or employers.

(6) Parties to a collective bargaining process may request the information contained in the statement contemplated in subsection (1) for the collective bargaining purposes subject to section 16 (4) and (5) of the Labour Relations Act.

CHAPTER IV

Commission for employment equity

28. Establishment of Commission for Employment Equity

The Commission for Employment Equity is hereby established. (Date of commencement 14 May, 1999)

29. Composition of Commission for Employment Equity

(1) The Commission consists of a chairperson and eight other members appointed by the Minister to hold office on a part-time basis.

(2) The members of the Commission must include-

(a) two people nominated by those voting members of NEDLAC who represent organised labour;

(b) two people nominated by those voting members of NEDLAC who represent organised business;

(c) two people nominated by those voting members of NEDLAC who represent the State; and

(d) two people nominated by those voting members of NEDLAC who represent the organisations of community and development interests in the Development Chamber in NEDLAC.

(3) A party that nominates persons in terms of subsection (2) must have due regard to promoting the representivity of people from designated groups.

(4) The Chairperson and each other member of the Commission-

(a) must have experience and expertise relevant to the functions contemplated in section 30;

(b) must act impartially when performing any function of the Commission;

(c) may not engage in any activity that may undermine the integrity of the Commission; and

(d) must not participate in forming or communicating any advice on any matter in respect of which they have a direct financial interest or any other conflict of interest.

(5) The Minister must appoint a member of the Commission to act as chairperson whenever the office of chairperson is vacant.

(6) The members of the Commission must choose from among themselves a person to act in the capacity of chairperson during the temporary absence of the chairperson.

(7) The Minister may determine-

(a) the term of office for the chairperson and for each member of the Commission, but no member's term of office may exceed five years;

(b) the remuneration and allowances to be paid to members of the Commission with the concurrence of the Minister of Finance; and

(c) any other conditions of appointment not provided for in this section.

(8) The chairperson and members of the Commission may resign by giving at least one month's written notice to the Minister.

(9) The Minister may remove the chairperson or a member of the Commission from office for-

(a) serious misconduct;

(b) permanent incapacity;

(c) that person's absence from three consecutive meetings of the Commission without the prior permission of the chairperson, except on good cause shown; or

(d) engaging in any activity that may undermine the integrity of the Commission.

(Date of commencement of s. 29: 14 May, 1999)

30. Functions of Commission for Employment Equity

(1) The Commission advises the Minister on-

(a) codes of good practice issued by the Minister in terms of section 54;

(b) regulations made by the Minister in terms of section 55; and

(c) policy and any other matter concerning this Act.

(2) In addition to the functions in subsection (1) the Commission may-

(a) make awards recognising achievements of employers in furthering the purpose of this Act;

(b) research and report to the Minister on any matter relating to the application of this Act, including appropriate and well-researched norms and benchmarks for the setting of numerical goals in various sectors; and

(c) perform any other prescribed function.

(Date of commencement of s. 30: 14 May, 1999)

31. Staff and expenses

Subject to the laws governing the public service, the Minister must provide the Commission with the staff necessary for the performance of its functions.

(Date of commencement 14 May, 1999)

32. Public hearings

In performing its functions, the Commission may-

(a) call for written representations from members of the public; and

(b) hold public hearings at which it may permit members of the public to make oral representations.

(Date of commencement of s. 32: 14 May, 1999)

33. Report by Commission for Employment Equity

The Commission must submit an annual report to the Minister.

(Date of commencement 14 May, 1999)

CHAPTER V

Monitoring, enforcement and legal proceedings

Part A: Monitoring and Enforcement

34. Monitoring by employees and trade union representatives

Any employee or trade union representative may bring an alleged contravention of this Act to the attention of-

(a) another employee;

(b) an employer;

(c) a trade union;

(d) a workplace forum;

(e) a labour inspector;

(f) the Director-General; or

(g) the Commission.

35. Powers of labour inspectors

A labour inspector acting in terms of this Act has the authority to enter, question and inspect as provided for in sections 65 and 66 of the Basic Conditions of Employment Act.

36. Undertaking to comply

A labour inspector must request and obtain a written undertaking from a designated employer to comply with paragraphs (a) to (j) within a specified period, if the inspector has reasonable grounds to believe that the employer has failed to-

(a) consult with employees as required by section 16;

(b) conduct an analysis as required by section 19;

(c) prepare an employment equity plan as required by section 20;

(d) implement its employment equity plan;

(e) submit an annual report as required by section 21;

(f) publish its report as required by section 22;

(g) prepare a successive employment equity plan as required by section 23;

(h) assign responsibility to one or more senior managers as required by section 24;

(i) inform its employees as required by section 25; or

(j) keep records as required by section 26.

37. Compliance order

(1) A labour inspector may issue a compliance order to a designated employer if that employer has-

(a) refused to give a written undertaking in terms of section 36, when requested to do so; or

(b) failed to comply with a written undertaking given in terms of section 36.

(2) A compliance order issued in terms of subsection (1) must set out-

(a) the name of the employer, and the workplaces to which the order applies;

(b) those provisions of Chapter III of this Act which the employer has not complied with and details of the conduct constituting non-compliance;

(c) any written undertaking given by the employer in terms of section 36 and any failure by the employer to comply with the written undertaking;

(d) any steps that the employer must take and the period within which those steps must be taken;

(e) the maximum fine, if any, that may be imposed on the employer in terms of Schedule 1 for failing to comply with the order; and

(f) any other prescribed information.

(3) A labour inspector who issues a compliance order must serve a copy of that order on the employer named in it.

(4) A designated employer who receives a compliance order served in terms of subsection (3) must display a copy of that order prominently at a place accessible to the affected employees at each workplace named in it.

(5) A designated employer must comply with the compliance order within the time period stated in it, unless the employer objects to that order in terms of section 39.

(6) If a designated employer does not comply with an order within the period stated in it, or does not object to that order in terms of section 39, the Director-General may apply to the Labour Court to make the compliance order an order of the Labour Court.

38. Limitations

A labour inspector may not issue a compliance order in respect of a failure to comply with a provision of Chapter III of this Act if--

(a) the employer is being reviewed by the Director-General in terms of section 43; or

(b) the Director-General has referred an employer's failure to comply with a recommendation to the Labour Court in terms of section 45.

39. Objections against compliance order

(1) A designated employer may object to a compliance order by making written representations to the Director-General within 21 days after receiving that order.

(2) If the employer shows good cause at any time, the Director-General may permit the employer to object after the period of 21 days has expired.

(3) After considering the designated employer's representations and any other relevant information, the Director-General-

(a) may confirm, vary or cancel all or any part of the order to which the employer objected; and

(b) must specify the time period within which that employer must comply with any part of the order that is confirmed or varied.

(4) The Director-General must, after making a decision in terms of subsection (3), and within 60 days after receiving the employer's representations, serve a copy of that decision on that employer.

(5) A designated employer who receives an order of the Director-General must either-

(a) comply with that order within the time period stated in it; or

(b) appeal against that order to the Labour Court in terms of section 40.

(6) If a designated employer does not comply with an order of the Director-General, or does not appeal against that order, the Director-General may apply to the Labour Court for that order to be made an order of the Labour Court.

40. Appeal from compliance order

(1) A designated employer may appeal to the Labour Court against a compliance order of the Director-General within 21 days after receiving that order.

(2) The Labour Court may at any time permit the employer to appeal after the 21-day time limit has expired, if that employer shows good cause for failing to appeal within that time limit.

(3) If the designated employer has appealed against an order of the Director-General, that order is suspended until the final determination of-

(a) the appeal by the Labour Court; or

(b) any appeal against the decision of the Labour Court in that matter.

41. Register of designated employers

(1) The Minister must keep a register of designated employers that have submitted the reports required by section 21.

(2) The register referred to in subsection (1) is a public document.

42. Assessment of compliance

In determining whether a designated employer is implementing employment equity in compliance with this Act, the Director-General or any person or body applying this Act must, in addition to the factors stated in section 15, take into account all of the following:

(a) The extent to which suitably qualified people from and amongst the different designated groups are equitably represented within each occupational category and level in that employer's workforce in relation to the-

(i) demographic profile of the national and regional economically active population;

(ii) pool of suitably qualified people from designated groups from which the employer may reasonably be expected to promote or appoint employees;

(iii) economic and financial factors relevant to the sector in which the employer operates;

(iv) present and anticipated economic and financial circumstances of the employer; and

(v) the number of present and planned vacancies that exist in the various categories and levels, and the employer's labour turnover;

(b) progress made in implementing employment equity by other designated employers operating under comparable circumstances and within the same sector;

(c) reasonable efforts made by a designated employer to implement its employment equity plan;

(d) the extent to which the designated employer has made progress in eliminating employment barriers that adversely affect people from designated groups; and

(e) any other prescribed factor.

43. Review by Director-General

(1) The Director-General may conduct a review to determine whether an employer is complying with this Act.

(2) In order to conduct the review the Director-General may-

(a) request an employer to submit to the Director-General a copy of its current analysis or employment equity plan;

(b) request an employer to submit to the Director-General any book, record, correspondence, document or information that could reasonably be relevant to the review of the employer's

compliance with this Act;

(c) request a meeting with an employer to discuss its employment equity plan, the implementation of its plan and any matters related to its compliance with this Act; or

(d) request a meeting with any-

(i) employee or trade union consulted in terms of section 16;

(ii) workplace forum; or

(iii) other person who may have information relevant to the review.

44. Outcome of Director-General's review

Subsequent to a review in terms of section 43, the Director-General may-

(a) approve a designated employer's employment equity plan; or

(b) make a recommendation to an employer, in writing, stating-

(i) steps which the employer must take in connection with its employment equity plan or the implementation of that plan, or in relation to its compliance with any other provision of this Act; and

(ii) the period within which those steps must be taken; and

(iii) any other prescribed information.

45. Failure to comply with Director-General's recommendation

If an employer fails to comply with a request made by the Director-General in terms of section 43 (2) or a recommendation made by the Director-General in terms of section 44 (b), the Director-General may refer the employer's non-compliance to the Labour Court.

PART B: Legal proceedings

46. Conflict of proceedings

(1) If a dispute has been referred to the CCMA by a party in terms of Chapter II and the issue to which the dispute relates also forms the subject of a referral to the Labour Court by the Director-General in terms of section 45, the CCMA proceedings must be stayed until the Labour Court makes a decision on the referral by the Director-General.

(2) If a dispute has been referred to the CCMA by a party in terms of Chapter II against an employer being reviewed by the Director-General in terms of section 43, there may not be conciliation or adjudication in respect of the dispute until the review has been completed and the employer has been informed of the outcome.

47. Consolidation of proceedings

Disputes concerning contraventions of this Act by the same employer may be consolidated.

48. Powers of commissioner in arbitration proceedings

A commissioner of the CCMA may, in any arbitration proceedings in terms of this Act, make any appropriate arbitration award that gives effect to a provision of this Act.

49. Jurisdiction of Labour Court

The Labour Court has exclusive jurisdiction to determine any dispute about the interpretation or application of this Act, except where this Act provides otherwise.

50. Powers of Labour Court

(1) Except where this Act provides otherwise, the Labour Court may make any appropriate order including-

(a) on application by the Director-General in terms of section 37 (6) or 39 (6) making a compliance order an order of the Labour Court;

(b) subject to the provisions of this Act, condoning the late filing of any document with, or the late referral of any dispute to, the Labour Court;

(c) directing the CCMA to conduct an investigation to assist the Court and to submit a report to the Court;

(d) awarding compensation in any circumstances contemplated in this Act;

(e) awarding damages in any circumstances contemplated in this Act;

(f) ordering compliance with any provision of this Act; including a request made by the Director-General in terms of section 43 (2) or a recommendation made by the Director-General in terms of section 44 (b);

(g) imposing a fine in accordance with Schedule 1 for a contravention of certain provisions of this Act;

(h) reviewing the performance or purported performance of any function provided for in this Act or any act or omission of any person or body in terms of this Act on any grounds that are permissible in law;

(i) in an appeal under section 40, confirming, varying or setting aside all or part of an order made by the Director-General in terms of section 39; and

(j) dealing with any matter necessary or incidental to performing its functions in terms of this Act.

(2) If the Labour Court decides that an employee has unfairly discriminated against, the Court may make any appropriate order that is just and equitable in the circumstances, including-

(a) payment of compensation by the employer to that employee;

(b) payment of damages by the employer to that employee;

(c) an order directing the employer to take steps to prevent the same unfair discrimination or a similar practice occurring in the future in respect of other employees;

(d) an order directing an employer, other than a designated employer, to comply with Chapter III as if it were a designated employer;

(e) an order directing the removal of the employer's name from the register referred to in section 41; or

(f) the publication of the Court's order.

(3) The Labour Court, in making any order, may take into account any delay on the part of the party who seeks relief in processing a dispute in terms of this Act.

(4) If the Labour Court declares that the medical testing of an employee as contemplated in section 7 is justifiable, the court may make any order that it considers appropriate in the circumstances, including imposing conditions relating to-

(a) the provision of counselling;

(b) the maintenance of confidentiality;

(c) the period during which the authorisation for any testing applies; and

(d) the category or categories of jobs or employees in respect of which the authorisation for testing applies.

Part C: Protection of employee rights

51. Protection of employee rights

(1) No person may discriminate against an employee who exercises any right conferred by this Act.

(2) Without limiting the general protection conferred by subsection (1), no person may threaten to do, or do any of the following:

(a) Prevent an employee from exercising any right conferred by this Act or from participating in any proceedings in terms of this Act; or

(b) prejudice an employee because of past, present or anticipated-

(i) disclosure of information that the employee is lawfully entitled or required to give to another person;

(ii) exercise of any right conferred by this Act; or

(iii) participation in any proceedings in terms of this Act.

(3) No person may favour, or promise to favour, an employee in exchange for that employee not exercising any right conferred by this Act or not participating in any proceedings in terms of this Act.

(4) Nothing in this section precludes the parties to a dispute arising out of an alleged breach of any right conferred by this Part, from concluding an agreement to settle the dispute.

(5) For the purposes of this section "employee" includes a former employee or an applicant for employment.

52. Procedure for disputes

(1) If there is a dispute about the interpretation or application of this Part, any party to the dispute may refer it in writing to the CCMA.

(2) The CCMA must attempt to resolve a dispute referred to it in terms of this Part through conciliation.

(3) If the dispute remains unresolved after conciliation-

(a) any party to the dispute may refer it to the Labour Court for adjudication; or

(b) all the parties to the dispute may consent to arbitration of the dispute by the CCMA.

(4) In respect of a dispute in terms of this Part, the relevant provisions of Part C and D of Chapter VII of the Labour Relations Act apply, read with the changes required by the context.

CHAPTER VI

General provisions

53. State contracts

(1) Every employer that makes an offer to conclude an agreement with any organ of state for the furnishing of supplies or services to that organ of state or for the hiring or letting of anything-

(a) must-

(i) if it is a designated employer, comply with Chapters II and III of this Act; or

(ii) if it is not a designated employer, comply with Chapter II of this Act; and

(b) attach to that offer either-

(i) a certificate in terms of subsection (2) which is conclusive evidence that the employer complies with the relevant Chapters of this Act; or

(ii) a declaration by the employer that it complies with the relevant Chapters of this Act, which, when verified by the Director-General, is conclusive evidence of compliance.

(2) An employer referred to in subsection (1) may request a certificate from the Minister confirming its compliance with Chapter II, or Chapters II and III, as the case may be.

(3) A certificate issued in terms of subsection (2) is valid for 12 months from the date of issue or until the next date on which the employer is obliged to submit a report in terms of section 21, whichever period is the longer.

(4) A failure to comply with the relevant provisions of this Act is sufficient ground for rejection of any offer to conclude an agreement referred to in subsection (1) or for cancellation of the agreement7.

54. Codes of good practice

(1) The Minister may, on the advice of the Commission-

(a) issue any code of good practice8; and

(b) change or replace any code of good practice.

(2) Any code of good practice, or any change to, or replacement of, a code of good practice must be published in the Gazette.

55. Regulations

(1) The Minister may, by notice in the Gazette and on the advice of the Commission, make any regulation regarding-

(a) any matter that this Act requires or permits to be prescribed; and

(b) any administrative or procedural matters that may be necessary or expedient to achieve the proper and effective administration of this Act.

(2) The Minister must by notice in the Gazette make a regulation providing for separate and simplified forms and procedures in respect of the obligations created by sections 19, 20, 21, 25 and 26 for employers that employ 150 or fewer employees.

56. Delegations

(1) The Minister may delegate any power conferred, or assign any duty imposed, upon the Minister in terms of this Act, except the powers and duties contemplated in sections 29 (1), (5) and (7), 53 (2), 54, 55, 59 (4) and 61 (4).

(2) A delegation or assignment must be in writing and may be subject to any conditions or restrictions determined by the Minister.

(3) The Minister may at any time-

(a) withdraw a delegation or assignment made in terms of subsection (1); and

(b) withdraw or amend any decision made by a person exercising a power or performing a duty delegated or assigned in terms of subsection (1).

(4) The Director-General may delegate any power conferred, or assign any duty imposed, upon the Director-General in terms of this Act, to any employee in the Department.

(5) Subsections (2) and (3) apply with the changes required by the context to any delegation or assignment by the Director-General under subsection (4).

57. Temporary employment services

(1) For purposes of Chapter III of this Act, a person whose services have been procured for, or provided to, a client by a temporary employment service is deemed to be the employee of that client, where that person's employment with the client is of indefinite duration or for a period of three months or longer.

(2) Where a temporary employment service, on the express or implied instructions of a client, commits an act of unfair discrimination, both the temporary employment service and the client are jointly and severally liable.

58. Designation of organs of state

The President must, within six months after the commencement of this Act, and after consultation with the Minister responsible for the Public Service and Administration, publish a notice in the Gazette listing every designated employer within any organ of state.

59. Breach of confidentiality

(1) Any person who discloses any confidential information acquired in the performance of a function in terms of this Act, commits an offence.

(2) Subsection (1) does not apply if the information-

(a) is disclosed to enable a person to perform a function in terms of this Act; or

(b) must be disclosed in terms of this Act, any other law or an order of court.

(3) A person convicted of an offence in terms of this section may be sentenced to a fine not exceeding R10 000,00.

(4) The Minister may, with the concurrence of the Minister of Justice and by notice in the Gazette, amend the maximum amount of the fine referred to in subsection (3) in order to counter the effect of inflation.

60. Liability of employers

(1) If it is alleged that an employee, while at work, contravened a provision of this Act, or engaged in any conduct that, if engaged in by that employee's employer, would constitute a contravention of a provision of this Act, the alleged conduct must immediately be brought to the attention of the employer.

(2) The employer must consult all relevant parties and must take the necessary steps to eliminate the alleged conduct and comply with the provisions of this Act.

(3) If the employer fails to take the necessary steps referred to in subsection (2), and it is proved that the employee has contravened the relevant provision, the employer must be deemed also to have contravened that provision.

(4) Despite subsection (3), an employer is not liable for the conduct of an employee if that employer is able to prove that it did all that was reasonably practicable to ensure that the employee would not act in contravention of this Act.

61. Obstruction, undue influence and fraud

(1) No person may-

(a) obstruct or attempt to improperly influence any person who is exercising a power or performing a function in terms of this Act; or

(b) knowingly give false information in any document or information provided to the Director-General or a labour inspector in terms of this Act.

(2) No employer may knowingly take any measure to avoid becoming a designated employer.

(3) A person who contravenes a provision of this section commits an offence and may be sentenced to a fine not exceeding R10 000,00.

(4) The Minister may, with the concurrence of the Minister of Justice and by notice in the Gazette, amend the maximum amount of the fine referred to in subsection (3) in order to counter the effect of inflation.

62. This Act binds the State

This Act binds the State.

63. Application of Act when in conflict with other laws

If any conflict relating to a matter dealt with in this Act arises between this Act and the provisions of any other law other than the Constitution or an Act of Parliament expressly amending this Act, the provisions of this Act prevail.

64. Repeal of laws and transitional arrangements

Each of the laws referred to in the first two columns of Schedule 2 is repealed to the extent specified opposite that law in the third column of that Schedule.

65. Short title and commencement

(1) This Act is called the Employment Equity Act, 1998.

(2) This Act takes effect on a date to be determined by the President by proclamation in the Gazette. The President may determine different dates in respect of different provisions of this Act.

(3) If, in terms of subsection (2), different dates are determined for particular provisions of this Act-

(a) Schedule 2 must take effect at the same time as section 6 (1) takes effect; and

(b) a reference in a provision of this Act to a time when this Act took effect must be construed as a reference to the time when that provision takes effect.

SCHEDULE 1

Maximum permissible fines that may be imposed for contravening this act

This Schedule sets out the maximum fine that may be imposed in terms of this Act for the contravention of certain provisions of this Act.

Previous Contravention	Contravention of any Provision of Sections 16, 19, 20, 21, 22 and 23
No previous contravention	R500 000
A previous contravention in respect of the same provision	R600 000
A previous contravention within the previous 12 months or two previous contraventions in respect of the same provision within three years	R700 000
Three previous contraventions in respect of the same provision within three years	R800 000
Four previous contraventions in respect of the same provision within three years	R900 000

SCHEDULE 2

Laws repealed

Number and year of law	Short title	Extent of repeal
Act No. 66 of 1995	Labour Relations Act, 1995	Item 2 (1) (a), 2 (2) and 3 (4) (a) of Schedule 7

SCHEDULE 3

Transitional arrangements

1. Definitions

In this Schedule, unless the context indicates otherwise-

"**pending**" means existing immediately before this Act came into operation; and

"**repealed provisions of the Labour Relations Act**" means the provisions of the Labour Relations Act repealed by Schedule 2.

2. Disputes arising before commencement of this Act

Any dispute contemplated in item (2) (1) (a) of Schedule 7 of the Labour Relations Act that arose before the commencement of this Act, must be dealt with as if the repealed provisions of the Labour Relations Act had not been repealed.

3. Courts

(1) In any pending dispute contemplated in item (2) (1) (a) of Schedule 7 of the Labour Relations Act in respect of which the Labour Court or the Labour Appeal Court had jurisdiction and in respect of which proceedings had not been instituted before the commencement of this Act, proceedings must be instituted in the Labour Court or Labour Appeal Court (as the case may be) and dealt with as if the repealed provisions of the Labour Relations Act had not been repealed.

(2) Any dispute contemplated in item (2) (1) (a) of Schedule 7 of the Labour Relations Act in respect of which proceedings were pending in the Labour Court or Labour Appeal Court must be proceeded with as if the repealed provisions of the Labour Relations Act had not been repealed.

(3) Any pending appeal before the Labour Appeal Court must be dealt with by the Labour Appeal Court as if the repealed provisions of the Labour Relations Act had not been repealed.

(4) When acting in terms of subitems (1) to (3), the Labour Court or Labour Appeal Court may perform or exercise any function or power that it had in terms of the repealed provisions of the Labour Relations Act.

SCHEDULE 4

Turnover threshold applicable to designated employers

Sector or subsectors in accordance with the Standard Industrial Classification	**Total annual turnover**
Agriculture	R2,00 m
Mining and Quarrying	R7,50 m
Manufacturing	R10,00 m
Electricity, Gas and Water	R10,00 m
Construction	R5,00 m
Retail and Motor Trade and Repair Services	R15,00 m
Wholesale Trade, Commercial Agents and Allied Services	R25,00 m
Catering, Accommodation and other Trade	R5,00 m
Transport, Storage and Communications	R10,00 m
Finance and Business Services	R10,00 m
Community, Special and Personal Services	R5,00 m

ANNEXURE D

12 JAN 2003

REPUBLIC OF SOUTH AFRICA
REPUBLIEK VAN SUID-AFRIKA

Vol. 463 Cape Town, Kaapstad, 9 January Januarie 2004 No. 25899

THE PRESIDENCY

No 17 9 January 2004

It is hereby notified that the President has assented to the following Act, which is hereby published for general information:—

No. 53 of 2003: Broad-Based Black Economic Empowerment Act, 2003.

MOPRESIDENTE

No. 17 9 Januari 2004

Go itsisiwi fano gore MoPresidente o saenne Molao o o latelang o o phasalediwang kitso ya botlhe fano.—

No. 53 wa 2003: Molao wa Katoloso ya go Nonotsha Ikonomi ya Bantsho, 2003.

9 771682 584003 25899

(English text signed by the President.)
(Assented to 7 January 2004.)

ACT

To establish a legislative framework for the promotion of black economic empowerment; to empower the Minister to issue codes of good practice and to publish transformation charters; to establish the Black Economic Empowerment Advisory Council; and to provide for matters connected therewith.

PREAMBLE

WHEREAS under apartheid race was used to control access to South Africa's productive resources and access to skills;

WHEREAS South Africa's economy still excludes the vast majority of its people from ownership of productive assets and the possession of advanced skills;

WHEREAS South Africa's economy performs below its potential because of the low level of income earned and generated by the majority of its people;

AND WHEREAS, unless further steps are taken to increase the effective participation of the majority of South Africans in the economy, the stability and prosperity of the economy in the future may be undermined to the detriment of all South Africans, irrespective of race;

AND IN ORDER TO—

- promote the achievement of the constitutional right to equality, increase broad-based and effective participation of black people in the economy and promote a higher growth rate, increased employment and more equitable income distribution; and
- establish a national policy on broad-based black economic empowerment so as to promote the economic unity of the nation, protect the common market, and promote equal opportunity and equal access to government services,

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:—

ARRANGEMENT OF ACT

Sections

Definitions

1. In this Act, unless the context indicates otherwise—

"black people" is a generic term which means Africans, Coloureds and Indians;

"broad-based black economic empowerment" means the economic empowerment of all black people including women, workers, youth, people with disabilities and 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;

(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; and

(f) investment in enterprises that are owned or managed by black people;

"Council" means the Black Economic Empowerment Advisory Council established by section 4;

"members" means members of the Council;

"Minister" means the Minister of Trade and Industry;

"organ of state" means—

(a) a national or provincial department as defined in the Public Finance Management Act, 1999 (Act No. 1 of 1999);

(b) a municipality as contemplated in the Constitution;

(c) Parliament;

(d) a provincial legislature; and

(e) a constitutional institution listed in Schedule 1 to the Public Finance Management Act, 1999 (Act No. 1 of 1999);

"prescribe" means prescribe by regulation;

"public entity" means a public entity listed in Schedule 2 or 3 to the Public Finance Management Act, 1999 (Act No. 1 of 1999);

"strategy" means a strategy for broad-based black economic empowerment issued in terms of section 11; and

"this Act" includes any code of good practice or regulation made under this Act.

Objectives of Act

2. The objectives of this Act are to facilitate broad-based black economic empowerment by—

(a) promoting economic transformation in order to enable meaningful participation of black people in the economy;

(b) achieving a substantial change in the racial composition of ownership and management structures and in the skilled occupations of existing and new enterprises;

(c) increasing the extent to which communities, workers, cooperatives and other collective enterprises own and manage existing and new enterprises and increasing their access to economic activities, infrastructure and skills training;

(d) increasing the extent to which black women own and manage existing and new enterprises, and increasing their access to economic activities, infrastructure and skills training;

(e) promoting investment programmes that lead to broad-based and meaningful participation in the economy by black people in order to achieve sustainable development and general prosperity;

(f) empowering rural and local communities by enabling access to economic activities, land, infrastructure, ownership and skills; and

(g) promoting access to finance for black economic empowerment.

Interpretation of Act

3. Any person applying this Act must interpret its provisions so as—

(a) to give effect to its objectives; and

(b) to comply with the Constitution.

Establishment of Black Economic Empowerment Advisory Council

4. The Black Economic Empowerment Advisory Council is hereby established.

Functions of Council

5. The Council must—

(a) advise government on black economic empowerment;

(b) review progress in achieving black economic empowerment;

(c) advise on draft codes of good practice which the Minister intends publishing for comment in terms of section 9(5);

(d) advise on the development, amendment or replacement of the strategy referred to in section 11;

(e) if requested to do so, advise on draft transformation charters; and

(f) facilitate partnerships between organs of state and the private sector that will advance the objectives of this Act.

Composition of Council and appointment of members

6. (1) The Council consists of—

(a) the President, who is the chairperson of the Council;

(b) the Minister, with the Minister's Director-General as an alternate;

(c) three other Cabinet Ministers, appointed by the President, with their respective Directors-General as alternates;

(d) no fewer than 10 and no more than 15 other members appointed by the President.

(2) When appointing members in terms of subsection (1)*(d)*, the President shall have regard to the need for the Council—

(a) to have appropriate expertise;

(b) to represent different relevant constituencies including trade unions, business, community-based organisations and academics.

(3) In appointing members in terms of subsection (1)*(d)*, the President shall follow an appropriate consultative process.

(4) The President shall appoint a Cabinet Minister who is also a member of the Council to act as chairperson of the Council in the President's absence.

Constitution and rules of Council

7. (1) The Minister must establish a constitution for the Council.

(2) The Minister may amend the constitution of the Council from time to time, after consultation with the Council.

(3) The Council may, by resolution, and after consultation with the Minister, make rules to further regulate the proceedings of the Council.

Remuneration and reimbursement of expenses

8. Council members will not be remunerated for their services, but will be reimbursed for expenses incurred by them in carrying out their duties, as determined by the Minister, with the concurrence of the Minister of Finance.

Codes of good practice

9. (1) In order to promote the purposes of the Act, the Minister may by notice in the *Gazette* issue codes of good practice on black economic empowerment that may include—

(a) the further interpretation and definition of broad-based black economic empowerment and the interpretation and definition of different categories of black empowerment entities;

(b) qualification criteria for preferential purposes for procurement and other economic activities;

(c) indicators to measure broad-based black economic empowerment;

(d) the weighting to be attached to broad-based black economic empowerment indicators referred to in paragraph *(c)*;

(e) guidelines for stakeholders in the relevant sectors of the economy to draw up transformation charters for their sector; and

(f) any other matter necessary to achieve the objectives of this Act.

(2) A strategy issued by the Minister in terms of section 11 must be taken into account in preparing any code of good practice.

(3) A code of good practice issued in terms of subsection (1) may specify—

(a) targets consistent with the objectives of this Act; and

(b) the period within which those targets must be achieved.

(4) In order to promote the achievement of equality of women, as provided for in section 9(2) of the Constitution, a code of good practice issued in terms of subsection (1) and any targets specified in a code of good practice in terms of subsection (3), may distinguish between black men and black women.

(5) The Minister must, before issuing, replacing or amending a code of good practice in terms of subsection (1)—

(a) publish the draft code of good practice or amendment in the *Gazette* for public comment; and

(b) grant interested persons a period of at least 60 days to comment on the draft code of good practice or amendment, as the case may be.

Status of codes of good practice

10. Every organ of state and public entity must take into account and, as far as is reasonably possible, apply any relevant code of good practice issued in terms of this Act in—

(a) determining qualification criteria for the issuing of licences, concessions or other authorisations in terms of any law;

(b) developing and implementing a preferential procurement policy;

(c) determining qualification criteria for the sale of state-owned enterprises; and

(d) developing criteria for entering into partnerships with the private sector.

Strategy for broad-based black economic empowerment

11. (1) The Minister—

(a) must issue a strategy for broad-based black economic empowerment;

(b) may change or replace a strategy issued in terms of this section.

(2) A strategy in terms of this section must—

(a) provide for an integrated co-ordinated and uniform approach to broad-based 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;
(*c*) provide a system for organs of state, public entities and other enterprises to prepare broad-based black economic empowerment plans and to report on compliance with those plans; and
(*d*) be consistent with this Act.

Transformation charters

12. The Minister must publish in the *Gazette* for general information and promote a transformation charter for a particular sector of the economy, if the Minister is satisfied that the charter—
(*a*) has been developed by major stakeholders in that sector; and
(*b*) advances the objectives of this Act.

Support services and funding of Council

13. (1) The Department of Trade and Industry must provide the Council with the necessary support services and funding out of money appropriated by Parliament for that purpose.

(2) The funds referred to in subsection (1), must be utilised for—
(*a*) the establishment and operating costs of the Council; and
(*b*) the development and implementation of a communication plan on broad-based black economic empowerment.

Regulations

14. The Minister may make regulations with regard to any matter that it is necessary to prescribe in order to ensure the proper implementation of this Act.

Short title and commencement

15. This Act is called the Broad-Based Black Economic Empowerment Act, 2003, and comes into operation on a date to be determined by the President by proclamation in the *Gazette*.