

## Paul Janisch

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**From:** Kevin Lester [lester@tca.za.com]  
**Sent:** 12 August 2008 08:44 PM  
**To:** paul@caird.co.za  
**Subject:** FW: Commentary relating to the draft Tourism Charter

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**From:** Kevin Lester  
**Sent:** 12 August 2008 08:38 PM  
**To:** Nomonde mesatywa; 'bee-tourism@thedti.gov.za'  
**Subject:** Commentary relating to the draft Tourism Charter

To whom it may concern

Here following, please find Transcend Corporate Advisors' commentary on the draft Sector Code for the Tourism Charter.

1. Transcend Corporate Advisors is South Africa's largest BEE consulting house and has many clients who have businesses falling within the scope of the Tourism Charter. We are currently advising a number of these clients on the implications of the draft Sector Code.
2. We wish to congratulate the Tourism Empowerment Council and their chairperson, Mr Tami Sokutu, on a job well done. The draft Sector Code is simple, easily understood and is accordingly a fitting effort with which to commence the process of implementing Sector Codes.
3. It is unfortunately our view that, notwithstanding the good work done, a number of procedural and technical aspects are in conflict with the provisions of section 9 of the B-BBEE Act of 2003 and Code 000 Statement 003 thereto, and that these procedural and technical anomalies may present serious challenges to the Minister in making his determination under paragraph 3 of Code 000 Statement 003. Some of these anomalies can in fact be addressed by the DTI following the end of the commentary period and these are hereinafter referred to as "**Non-Critical Non-Conformances**". There is however one non-conformance that is fatal, and in our opinion, failure to address this aspect **immediately** will render the draft Sector Code incapable of final gazetting by the Minister. This problem, we will deal with under the heading of "**Fatal Non-Conformances**".

**FATAL NON-CONFORMANCES:**

4. Throughout the QSE and non QSE Scorecard, there are consistently applied variances to both Targets and Weighting as set forth in the Codes of Good Practice issued in February 2007. It is not necessary to identify each and every one of these instances as they are self evident.

5. Paragraph 3.1.5 of Code 000 Statement 003 states as follows:
    - 3.1 The following principles apply to developing Sector Codes: ....
    - 3.1.5 the proposed Sector Code may deviate from Targets and Weightings used in the Codes only where those deviations are justifiable based on sound economic principles, sectoral characteristics or empirical research;
  6. Paragraph 3.3.4 of Code 000 Statement 003 states as follows:
    - 3.3 The Minister **must** refuse an application under this paragraph 3 if the proposed Sector Code ....
    - 3.3.4 contains inconsistencies in the Targets and Weightings referred to in paragraph 3 1.5 unless fully justified under that paragraph; ... (*our emphasis*)
  7. In dealing with this issue, the draft Code at paragraph 1 states as follows:  
We have ensured that the Tourism BEE Charter fulfils the requirements set out under Section 9, for gazetting as a Sector Code, namely that the Charter;
    - (a) Has no deviations from Codes definitions and principles;
    - (b) Is sufficiently comparable to the codes in the order of elements, targets and weightings;
    - (c) Has justifiable differences to the Codes.
  8. No information is supplied as to the nature of justifications.
  9. The purpose of a public participation process is to allow the public (which is not limited to persons with a direct interest in the Sector) to make representations as to the content of laws of general application that would be made applicable to them directly or indirectly. We submit that the public participation process is a key requirement for the democratic legitimation of any legislative instrument, such as a Sector Code, which directly or indirectly limits any number of rights contained in the Bill of Rights. If the democratic legitimation of an instrument such as a BEE Sector Code is defective, then that instrument will not qualify as a law of general application, and accordingly fail the test of section 36 of the Constitution.
  10. It is our view, and that of a number of legal experts with whom we have discussed the matter, that excluding the “public” from access to the explanation or reasons for the Target and Weighting variations is to render useless their comments. There is no imaginable manner by which the public can respond or apply their mind to something which is not in the public domain.
  11. Were the Minister to gazette the Sector Code under paragraph 3 and Section 9 in the knowledge that the public was not permitted access to the reasons for the variances, he would render himself susceptible to legal challenge. Indeed, it is questionable that he would be able to contend that he applied his mind to the question if he proceeded to gazette the Sector Code in the knowledge that the public was not given full access to the materials required. In such an instance, the prospects for a successful review of the Minister’s actions would be extremely good!
  12. In the interests of ensuring that the draft Sector Code is not impaired, we would recommend that the DTI and the Tourism Empowerment Council immediately prepare a schedule of justifications and gazette these alongside the draft Sector Code. We would further recommend that the commentary period be extended by at least one month to allow interested persons to review the schedule of justifications.
  13. For the benefit of the DTI and the Tourism Empowerment Council, we also draw to you attention that current opinion in legal circles suggest that a variation in target (whether up or down) is a constitutionally more relevant variation than a variation in weighting. For this reason, we would urge that close attention is paid to the justification of the higher ownership target. We would suggest that “sectoral characteristics” would be insufficient grounds given the provisions of section 36 of the Constitution read in conjunction with paragraph 3.1.5 of Code 000 Statement 003.
  14. We are confident that all of the variations can be justified, but are extremely alarmed that the justifications have not be provided.
- NON-CRITICAL NON-CONFORMANCES:**
15. The statement contained at the head of each of the Scorecards “...or other thresholds as determined by the sector...” is insufficiently precise to allow the public to comment on the thresholds in question. Ordinarily, this would represent a **FATAL NON-CONFORMANCE**, but since the DTI can merely correct the

non-conformance by deleting the offending phrase on both scorecards, we consider this to be a **NON-CRITICAL NON-CONFORMANCE**. The problem is however not curable in any other manner than by deletion of the offending text. This is by reason of the provisions of paragraph 3.1.3 and 3.1.4 of Code 000 Statement 003. Those provisions prohibit any variation in the definition of beneficiaries or the calculation methodology. EME's and QSE's are direct beneficiaries of the Code and hence, any variation in the definition of EME's and QSE's amounts to a prohibited variation, not capable of justification under paragraph 3.3 of Code 000 Statement 003. Similarly, a change in the definition of EME's and QSE's would also amount to a change in calculation methodology, similarly a prohibited variation. We recommend that the DTI simply delete the offending text from the final version.

16. Paragraph 3.1.7 of Code 000 Statement 003 is emphatic as to the need for absolute clarity of the definition of the scope of the sector. Paragraph 3.3.5 compels the Minister to refuse an application for gazetting if a draft Sector Code "... contains inadequacies or a potential for ambiguity in defining the scope of the sector as referred to in paragraph 3.1.7". We are of the view that the definition of the scope of the charter as contained in paragraph 7 is seriously flawed in that insufficient attention has been paid to the fact that a number of the listed business activities may have absolutely nothing to do with tourism, but nevertheless fall within the definition. Examples follow:
- a. Restaurants that are outsourced canteens of corporates or government departments cannot conceivably fall within the tourism sector and happen to be fairly common enterprise development initiative of many large corporates;
  - b. Conference venues run by corporate training companies or operated on an outsourced basis by large corporates cannot be considered subject to the tourism sector. Consider for example the training venues of many banks and mining companies which are commonly operated on an outsourced basis to those banks and mines, but not to the general public.
  - c. Professional catering is a service provided widely throughout the economy and very seldom has anything to do with the tourism sector. It is a common area for enterprise development and is more often than not functionally linked to tourism in any manner. Consider by way of example the company to whom the DTI outsources its catering function – there is no conceivable way in which such companies can be considered tourism service providers
  - d. Many car rental companies are known to derive well in excess of 50% of their revenues from business trade rather than tourism trade. We recognise that car rental companies present a unique challenge and suspect that wide latitude could be applied here, but would submit that a failure to include within the ambit of the scope, metered taxis and transit shuttles seriously impairs the consistency of the scope definition, particularly in view of the fact that the Transport Charters prepared by the DOT for possible gazetting as Sector Codes do not cover those sectors. Indeed the question must be asked as to why one would include rental cars and coach operators, but exclude passenger airlines and passenger rail transport.

This problem will need to be addressed in the final draft through correction effected by the DTI. While we have not had sufficient time to consider the issue, we suspect that the means by which to resolve this problem would be to define the scope as it currently stands, but then to qualify it by stating that businesses falling within the scope are automatically excluded to the extent that their services and products are generally not accessed by the general public or tourist public in relation to tourism.

We thank you for the opportunity to submit these comments and wish the Tourism Empowerment Council well in their initiatives. They represent a key empowerment opportunity in our economy and their continued diligence in transforming the sector will have positive consequences well beyond the boundaries of their sector.

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