

The Mining Charter and the Revised B-BBEE Codes



Is there an overlap in the Mining Charter and the Revised B-BBEE Codes?

Some of the elements of the Mining Charter and Revised Codes overlap. However, the application of the elements, such as Ownership differs vastly. Let's get to grips on this important topic.

Mining Charter facts

The Reviewed Broad-Based Black-Economic Empowerment Charter for the South African Mining and Minerals Industry (Charter) was published on 15 June 2017. The title of the Charter is misleading as it alludes to broad-based black economic empowerment. The publication however was done in terms of the Mineral and Petroleum Resources Development Act, Act 28 of 2002 and not the Broad-Based Black Economic Empowerment Act, Act 53 of 2003 (BEE-Act).

Only publications done in terms of *section 9(1) of the BEE Act* are codes to be used for *B-BBEE verification purposes*.

The vision of the mining charter is to facilitate sustainable transformation, growth and development of the mining and minerals industry. This is to be done by setting the framework, targets and timetable for effecting entry of previously disadvantaged South Africans to the mining industry. The main concern with the mining Charter is that there was no clear consultation process followed with the mining industry itself.

Mining companies obtain BEE certificates in terms of the Revised Codes of Good Practice 2013 (Revised Codes), and not the Mining Charter. The Mining Charter plays an important role in how the black ownership structures of the mining companies must be set up. Mining and exploration licences are issued to applicants in terms of the Charter, but it does not apply to those supplying goods or services to the mining industry.

The Revised Codes prescribe the targets for scoring points on the B-BBEE scorecard; however, companies operating within the mining industry still need to adhere to the targets set by the mining charter to obtain and maintain mining and prospecting rights. With the Revised Codes no sub-minimums apply. If these are not met companies would not automatically be disqualified from obtaining a B-BBEE certificate. However, in terms of the Mining Charter, failure to meet the minimum requirements on the checklist will lead to the mining and/ or prospecting rights being withdrawn or not being granted at all.

Ownership facts

Some of the elements of the Mining Charter and Revised Codes overlap. The application of the elements, however, differs vastly. *Ownership* is one of those elements. According to the Mining Charter, the following are important ***ownership compliance requirements***:

- Holders of new prospecting rights must have a minimum of 50% +1 vote black shareholding. According to the Revised Codes, the compliance target is 26% black ownership. If, however, a holder wants to secure prospecting rights (or mining rights as referred to below), it should, besides adhering to the minimum standards set by the Revised Codes, also follow those stipulated in the Mining Charter.
- Holders applying for new or renewed mining rights must have a minimum of 30% black shareholding. Of this 30%, 8% must be distributed to employee ownership schemes, 8% to mining communities (community trusts) and 14% issued to BEE entrepreneurs.
- A holder who claims recognition of historical BEE transactions is required to top up its black shareholding from the existing level to a minimum of 30% within a 12-month transitional period. Historical BEE transactions which had not achieve a minimum of 26% empowerment at the date on which the mining Charter was published shall not apply. This differs from the Revised Codes which recognises ownership after the sale or loss of shares by black participants (the so-called 'once empowered, always empowered' principle) subject to certain criteria. Once again the Revised Codes make for a more relaxed approach.
- A holder who, after the Mining Charter came into effect, maintained a 26% black shareholding shall be required to top up its black shareholding to 30% within a 12-month transitional period.
- A holder in the mining and minerals industry must afford black-owned companies a preferential option to purchase.

Mining companies are advised to bear in mind both the Revised Codes and the Mining Charter as compliance with one does not guarantee compliance with the other. There is doubt as to the legality of the Mining Charter in its present form. The Chamber of Mines has already indicated its intention to take the Charter on judicial review.

About our author: Audrey Cloete obtained her LLB degree from the North-West University Potchefstroom in 2003. She completed her articles with the main focus on Criminal Law and is also an admitted Conveyancer. Audrey joined SERR Synergy in 2015 where she currently works as a Legal Compliance Advisor.

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