

# Is Cosatu impacting on policy?

A case of broad-based black economic empowerment (BBBEE)

Does the labour movement critically evaluate its policy advocacy strategies? **Christina Ward** examines Cosatu's impact on the formulation of policy by using the process around the drafting of the BEE Codes and Charters as a case study.



For over a decade Cosatu's Policy Unit and Parliamentary Office have served as a vehicle for ensuring that the voice of labour is represented independent of the tripartite alliance in all stages of policy making. Cosatu is able to engage in policy deliberations both within the National Economic Development and Labour Council (Nedlac) and through the parliamentary process. Yet labour's access to policies in their earliest and most critical stage, at the departmental level, remains highly variable. The creation of BBBEE Codes of Good Practice and its subsidiary Financial Sector and Mining Charters illustrate how each government department's structure of policy processes set the boundaries to stakeholders' policy influence.

## BACKGROUND

The BEE Codes aim to elicit specific adjustments in behaviours among businesses that serve the long term development agenda. Whereas the Codes are implementation rules that all industries must adhere to, Charters are industry specific

adaptations of the Codes which add greater specificity to how the Codes will be implemented. Both the Codes and the Charters are BBBEE policies which flow from the BBBEE Act.

Whether the proposed Codes will sufficiently advance the broader development agenda is a shared concern among policy makers and labour advocates. Cosatu believes that the Codes as they have been defined will merely shift the racial distribution of the system without fundamentally changing the system of class inequality. This is because the incentive system within the Codes is biased towards the least transformative elements of the scorecard. The more easily satisfied elements, namely the management and ownership requirements, can be easily defined and evaluated in terms of the percentage of blacks represented. Yet these are the least progressive elements as they benefit blacks who have had access to education and finance, rather than the masses of unemployed and unskilled South Africans who need to be included in the development strategy. Elements like skills

development require more investment to plan and evaluate yet would have a much broader impact on a larger and more disadvantaged demographic. The National Union of Mineworkers (NUM) raised this issue among others during the drafting of the Mining Charter, the only Charter to pre-date the Codes. In the Financial Sector issues such as access to financial tools for the poor similarly became a dividing point between business, labour and the community.

## POLICY DRAFTING PROCESSES

The following analysis will examine the institutional characteristics that impacted on the policy drafting process within the Department of Trade and Industry (dti), Department of Minerals and Energy (DME) and Department of Finance (DoF).

## THE CODES AND THE DTI

The members of the BEE Task Team in the dti in charge of drafting all BBBEE policy came from somewhat diverse backgrounds, but overall had a clear private sector slant. Of only five members, one worked

previously at Cosatu, a second had a long history within the dti, and three others came from the private sector. Former trade unionist, Lionel October is the deputy director general of the dti who oversees BBBEE and, as a result of his background has created a clearer channel for Cosatu's BEE engagement. However, given that the team members are government employees, the private-sector-friendly orientation of the President and Cabinet have undoubtedly taken primacy. The most vulnerable set of interests, then, remains labour and community, as they are not well represented in the BEE Task Team.

The private-profit sector bias within the team is reflected in the drafts of the different components of BBBEE policy. The Task Team's initial suggestion to focus on skills development among upper tier management and its initial exclusion of labour and black community leadership in policy consultations indicate a focus on the perspective of the private sector. Many of the technocrats, consultants and businessmen involved in shaping BBBEE would argue that economic growth requires this focus on management. However, labour, community members, and academics argue that workers' needs will not be best served if all skills development occurs at the uppermost tiers of an organisation. Thus, the paradigm of the Team has drawn the policy somewhat away from its stated commitment to serving all historically disadvantaged blacks.

Business was extremely active during the public comment period for the first and second phases of the Codes of Good Practice (two separate pieces that define the Codes) and submitted the majority of the comments received by the department. Business is clearly advantaged by having greater

resources to engage and potentially more resources for developing empirical, rather than rhetorical arguments.

However, even members of the business community complained that they were not always fully consulted. The implication is that, as most interviewees from labour and one former dti employee claimed, the dti asserted considerable control over the process. Several interviewees phrased the situation as stakeholders being restricted to 'tinkering with the details' without being allowed to have any fundamental inputs. Limited stakeholder consultation thus limits the changes to the initial policy proposal.

The dti generally employs the strategy of establishing firm fundamental policy tenets before opening the policy up to discussion and feedback. Thus, the window of opportunity for creating alternatives is narrow. Because of the nature of the process, with only one proposal being crafted solely by the dti and the small staff being assigned to craft the policy, the dti was not receptive to considering multiple alternatives for defining BBBEE.

### SECTOR CHARTER PROCESSES

The Codes stated that all stakeholders be consulted during the development of Sector Charters. This has meant considerably more direct engagement by business and labour, although the level of engagement of labour has varied depending on how organised the relevant union is and on the strategic role that Cosatu chooses to play. The role played by business has also differed depending on how government departments have structured the process.

The development of the Mining and Financial Sector Charters serve as interesting points of comparison

to evaluate how the Codes developed. While both are lauded as the most progressive examples of Sector Charters produced and both were born out of community or union participation, the government departments took divergent approaches. Government through DME drove the drafting of the Mining Charter. The DME has made the implementation of the Charter a requirement to receive or renew a permit. In contrast, the Financial Sector Charter (FSC) was driven by business. The DoF has no direct control over assets that are privately managed by banks, therefore it can only attempt to create sufficient incentives to ensure they comply with BBBEE. It cannot regulate the industry in the same manner that the DME can regulate the mining industry.

The difference in approaches illustrates the two ways in which Charters can be used, depending on whether the government controls the primary assets or not. The Mining Charter is a rare instance where the government exercises direct control over the assets of the industry. While mining companies may own and operate the infrastructure of the mine, the minerals themselves are a government-owned asset. The DME, thus, had the means to use permit distribution as a regulatory tool. The DoF, in contrast, can only encourage voluntary implementation and is unable to use the Charter as a regulatory tool.

Both Charters ultimately ended up addressing a number of historical injustices. For the Mining Charter this included issues such as standards for housing and living conditions, meeting the needs of migrant labour, and investing in human resource development so as to create career paths for blacks at all levels. The FSC similarly addresses

historical issues such as access to finance for the poor and enterprise development. It also sets standards for community investment in target areas such as transport, water and energy, and social infrastructure such as health and education. The Financial Sector also established the first consultative body ever to be established in association with an industry: the Financial Sector Charter Council (FSCC). The FSCC will serve to enforce the proper implementation of BBBEE in the Financial Sector.

### STAKEHOLDER CONSULTATION

A curious feature of the FSC has been how participation of labour and community has sandwiched the overall process, being heaviest on the onset and the conclusion. The Charter arose out of a strong grassroots campaign and a formal Sector Summit, an organised discussion between business and labour over the Financial Sector. Yet during the most critical period, during the first drafting of the Codes, labour had little presence.

The government's decision to allow industry to 'drive the process' and, thus, to operate outside of existing multipartite structures during the earliest phases dealt labour a blow. A Cosatu representative argued that DoF essentially gave business the go-ahead to 'hijack' the process as it appeared to be the strategy which would win industry compliance. One BEE consultant recalled that although unions and community were eventually able to argue for inclusion in the process, the Charter was practically written by the time they got good representation.

It seems that the DoF only escaped the responsibility of ensuring balanced participation by leaving the process unstructured and 'up to the stakeholders to

organise'. The politically powerful stakeholder, business, naturally had the resources to take control of the process when no restrictions were placed on its engagement, which presumably was the original intention of the DoF.

Even when government does include labour it often lacks the resources and support such as secretarial services needed to participate fully. This puts labour at a disadvantage. During the creation of the FSCC, business tried to use its greater secretarial capacities to crowd out labour's input on how it should be structured. One involved labour advocate recounted, 'We thought [the banks] were going to provide secretary services, and later we found [that]... if you take minutes, if we say we are going to draft the document... it means you can only fiddle with my draft...' Over time labour brought attention to business' inappropriate behaviour and found ways to increase labour's role by setting rules for running the FSCC. '... the [FSCC] constitution is very clear... [everyone] must do his work within the powers extrapolated in the constitution.' Thus, labour used rules and guidelines for how the structure would be run to ensure its inclusion.

The key structural factor that labour did have working in its favour was the provision in the Codes mandating inclusion of stakeholders in Charter deliberations. This provided a platform for labour to argue for its involvement in the Charter process and ultimately helped them to create the FSCC.

In the mining sector, by contrast, DME has been the driving force behind the formation of the Mining Charter. According to an employee of the DME responsible for the Charter's development:

You don't have industry driving the process here. If you want to transform, you cannot allow the person most affected to say, "Devise your transformation plan."... As the regulator, the government... develops a framework document.

The degree to which each stakeholder was included was at the full discretion of the department. Thus, the nature of each Charter process depends heavily on the political ideology of ministers and deputy ministers deciding the process. It was a powerful statement that the deputy minister for DME chose to give structure to the process that engaged labour as much as it engaged representatives of business. The example of the DME poses the possibility that departments add structure to the policy development processes as a means of safeguarding access for the marginalised.

The decision by the DoF to stay as uninvolved in the Charter process as possible created considerable leeway for stakeholders to promote their preferred alternatives. Fortunately, the grassroots movement run by the SA Communist Party played a major role in preventing the complete capture of the FSC by business interests. Indeed, the Charter will continue to be refined through engagement in the FSCC - which is up for review in 2009. The DME set the framework of the Charter in a more autocratic manner and, similar to the dti, considered business and labour as sources of feedback for refining departmental ideas. Top leadership was consulted during the formulation of the Mining Charter, but consultation was compressed into a three week period involving only top leadership. These leaders did not have time to engage at a detailed level. This explains the

somewhat vague product; the Charter utilises a check list rather than a prescribed set of percentage targets. According to an employee in the DME, this creates the flexibility for businesses to pursue alternative routes to achieving BEE and allows for case facts to be utilised in each instance. However, this approach also runs counter to the predominant view among businesses that greater specificity about how to achieve empowerment will minimise the cost of implementation.

#### IMPLICATIONS OF THE CONTRASTING SYSTEMS

Both the development of the Charters and the Codes illustrate that where structure lacks, political biases will often guide the choices that are made about how to structure policy processes. In the case of the Mining Charter, the DME chose to drive the process while also ensuring consultation among stakeholders. Much like the Codes, its product was somewhat progressive while also accommodating industry. The DoF, in contrast, chose to exercise little oversight over how the Charter was developed or its contents. Whereas relatively neutral technocrats were hired within the dti to draft the Codes, business was asked to lead the process for the FSC. The unstructured nature of the process thus allowed the political bias of the DoF full expression. The initial drafts of the FSC produced by business did not set targets far above the status quo. Labour salvaged what might have been an extreme loss by its intervention later in the process. Labour's strong political power enabled it to create the phenomenal and ground-breaking product of the FSC. Thus, the flexible nature of the Charter process for the FSC

allowed dramatic changes throughout the process based on political clout.

Interestingly, the very different processes for producing the Mining Charter and the FSC both led to progressive outcomes. Labour played a strong role in each instance, but especially in the case of the FSC. Labour held considerable exogenous political power, was well organised and was highly active in both the instances of the Mining Charter and the FSC. This indicates that political power can compensate for the disempowering consequences of the structural arrangements in each case.

#### CONCLUSION

Choices made about institutional arrangements can change the very nature of the policies produced. The examples of the Charters and Codes present an interesting set of couplings: the relationship between having a highly structured policy making process that ensures all stakeholders are included versus an unstructured process where the politically powerful are allowed to dominate. The case of the Mining Charter illustrates that institutional leaders who chose to create a more formal structure for policy-making are also choosing to have balanced participation in the process by all stakeholders. This trend makes sense in light of the convictions that many government officials voiced about their commitment to the ideals set forth in the constitution, a central one being equal participation. For departments that believe deeply in this rhetoric, as with the DME, structure is viewed as a tool for creating a more even playing field for stakeholders.

In contrast, less structured processes either do not assure any

stakeholders participation or allow politically biased leadership in the institution to focus on a single stakeholder, either of which could allow the politically powerful to take control. In the case of the FSC, the leadership seemed to regard differentiated participation as necessary and equitable. Yet overtly creating a biased policy-making process would have created political uproar. So instead, it subtly stepped back from the role of managing the policy process. The actions of the DoF imply that even for those who are not driven by Constitutional ideology, any proposals that do not view equal political and economic participation as a tool for achieving equity would be grounds for instant criticism. Thus, the choice to have a less structured process may be a veiled decision to allow unequal participation in policy development.

In light of these stark differences in approaches to policy drafting and departmental disposition, Cosatu and its affiliates must carefully consider how to best leverage their resources and political power within each institutional context. Taking the first step of identifying which type of department each is – be it of the carefully controlled liberal variety like the DME, extremely conservative and hands-off like the DoF, or conservative and controlled like the dti – will provide labour with a more systematic basis for approaching policy advocacy.

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