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COMMENTS

on the

draft National Integrated Small Enterprise Development (NISED) Masterplan

To: Policy Unit, Department of Small Business Development

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Introduction

On 10 May 2022, the Minister of Small Business Development¹ published by Notice in the *Gazette* the draft *National Integrated Small Enterprise Development (NISED) Masterplan* for public comment.

The Minister's Notice states that comments must be submitted within 30 days of publication of the Notice. This means that comments must be submitted by 9 June 2022.

The Free Market Foundation comments as follows on that draft *National Integrated Small Enterprise Development (NISED) Masterplan*.

Headline observations

The proposed *National Integrated Small Enterprise Development Masterplan* is extensive and ambitious in scope, while acknowledging budgetary constraints.

The *Masterplan* ponders about how to entice small enterprises to register for tax and thereby become “formal” small enterprises, and how to urge sole proprietors and partnerships to incorporate. Any such devices will fail. Incorporating would impose a bureaucratic cost on small businesses.

The Minister should focus on identifying the types of legislation that have an effect on small enterprise, and on issuing guidelines for organs of state to amend their legislation to reduce its legislative burden on small enterprises.

Summary comments

The Minister intends to prescribe the *Masterplan* as the national strategy or “policy” for small enterprise support.

¹ Ms Stella Tembisa Ndabeni-Abrahams.

The Minister's proposed *Masterplan* was not accompanied by the required Socio-Economic Impact Assessment (SEIA). The Cabinet decided in 2007 that a consistent assessment of the socio-economic impact of policy initiatives was needed. From 2015, draft policies must include information generated by an SEIA of the proposed policy, as well as the full assessment countersigned by the SEIA System Unit established by the Dept of Planning, Monitoring & Evaluation. The role of the SEIA system is to minimise unintended consequences from policy initiatives, including unnecessary costs from implementation and compliance. An SEIA for a policy initiative should consider specifically the benefits or costs of the proposed policy for small enterprise.

The National Small Enterprise Act states that entities designated by the Director-General must, in co-operation with him or her, annually compile an "*Annual Review of Small Enterprise*". The *Annual Review* must cover, among other things summaries of any findings or recommendations of the Director-General in respect of legislation, proposed legislation and administrative practices which restrict the small enterprise sector. The Director-General must submit the *Annual Review* to the Minister, who must table it in Parliament.

But, despite the requirement that the *Annual Review* be compiled every year, the *Masterplan* observes that it has been published only "*haphazardly*". We found only two.

The draft *Masterplan* stresses that it is imperative, and fundamental to success of the *Masterplan*, that the *Annual Review* be published regularly, because the *Annual Review* is the central keystone for evaluating the impact of the strategy to develop small enterprise. But the *Masterplan* refers to "*Capacity restraints and budget to administer*".

The draft *Masterplan* observes that micro, small and medium enterprises operate in all sectors in the economy and range in size. The National Small Enterprise Act defines a "*small enterprise*" as an owner-managed business entity carried on in any of eleven economic sectors mentioned, and having such number of employees and annual turnover as categorise it as a "*micro*", "*small*" or "*medium*" enterprise in its sector.

The *Masterplan* states that a uniform definition across all departments and laws which deal with small businesses is needed, to target enterprises for "*support*" and "*incentives*". But, regrets the *Masterplan*, there is low uptake and a reluctance to adopt the Act's definition.

The Masterplan says that consideration should be given to allowing sole traders and self-employed entrepreneurs to register their enterprise with the Companies & Intellectual Property Commission, not to form a company but merely as a “*registration of trading*”.

It is unnecessary to introduce new measures to require the registration of sole-proprietor enterprises. Tax laws already require unincorporated sole traders to register.

Under the Income Tax Act, 1962 the SARS Commissioner must annually give notice of the persons who are required to furnish income-tax returns. The Commissioner’s annual notices have been requiring every natural person who during the year of assessment “*carried on any trade*” to submit a return. This means that every natural person who carried on any trade, “irrespective of his or her turnover, to submit an income tax return. The Income Tax Act requires every person who becomes liable to submit a return to be registered as a taxpayer.

The *Masterplan* programmes aims greater “*employment administrative compliance*”. But employment legislation already requires all small employers to register. The Unemployment Insurance Contributions Act, 2002 requires an “*employer*” (namely “*any person*” who is liable to pay to any person any salary, wage or other remuneration) to apply for registration to the SARS Commissioner.

The *Masterplan* speaks of “*incentivising*” compliance by informal SMMEs with employment and tax administration. It is of the view that participation in the “*formal economy*” means being “*registered for tax*”, and that providing “*formal employment*” means “*filing an IRP5 form*” (employee’s tax certificate), but does not wish to “*force*” formalisation. We submit that the only incentives that will tempt the unregistered to register are financial incentives at least equal to the likely tax burden that registering will attract. The *Masterplan* concedes that SMMEs may perceive registration as a way to coerce them to pay tax.

We submit that the Minister of Small Business Development should focus on gazetting notices which identify the types of legislation that may have an effect on small enterprise. The Minister should then focus on issuing guidelines for organs of state who administer legislation of any types so identified by the Minister, to amend their legislation to reduce its legislative burden on small enterprises. The National Small Enterprise Act authorises the Minister to identify types of legislation that may have

an effect on small enterprise and to publish guidelines on the assessment and review of the effect of existing legislation on small enterprise.

The *Masterplan* proposes that, for the purpose of formulating such guidelines, a “Task Team” be established “between Govt and business”. We submit that it is unnecessary to establish any such “*task team*” to formulate guidelines on the assessment and review of the effect of existing legislation on small enterprise.

The *Masterplan* adequately identifies types of legislation that have an adverse effect on small enterprise, and how such legislation should be assessed and reviewed. The *Masterplan*’s observations and recommendations are repeated in the final five pages of these comments of ours. The Minister’s guidelines should recommend that reforming legislation should relax restrictions for small enterprises defined by the National Small Enterprise Act as “*micro*”, “*small*” and “*medium*” enterprises in the economic sector with which the offending legislation is concerned.

There is no need to assess which restrictive laws should have priority for amendment.

Minister aims to gazette *Masterplan* as national strategy or policy

The Minister’s Notice² states that the Minister intends to prescribe the *Masterplan* in terms of the definitions in the first chapter of the National Small Enterprise Act, 1996,³ as the “*National Small Business Support Strategy*”.

The definitions provision in the first chapter of the National Small Enterprise Act⁴ defines the “*National Small Business Support Strategy*” as the “*national policy*” in respect of small enterprise support as published by the Minister in the *Gazette*, and includes the policy stated in the *White Paper on National Strategy for the Development and Promotion of Small Business*” published in the *Gazette* in 1995.⁵

² Govt N 2070 of 10 May 2022 (*Gazette* 46344), Dept of Small Business Development. Draft *National Integrated Small Enterprise Development Masterplan*.

³ National Small Enterprise Act 102 of 1996, Chap 1 s 1 (definitions).

⁴ National Small Enterprise Act, 1996 Chap 1 s 1 (definitions) svv “National Small Business Support Strategy”.

⁵ *White Paper on National Strategy for the Development and Promotion of Small Business in South Africa* Gen N 213 of 1995 (*Gazette* 16317 of 28 Mar 1995).

Proposed *Masterplan* not accompanied by required Socio-Economic Impact Assessment

The Minister's proposed *Masterplan* was not accompanied by the required Socio-Economic Impact Assessment.

Following a study commissioned by the Presidency and the National Treasury in response to concerns about failures to understand the full costs and impact of government measures on the economy, the Cabinet decided in 2007 that a consistent assessment of the socio-economic impact of policy initiatives⁶ was needed. From October 2015, draft policies⁷ submitted for approval by the Cabinet, or internally within a department, must include information generated by a socio-economic impact assessment of the proposed measure,⁸ as well as the full assessment countersigned by the Socio-Economic Impact Assessment System (SEIAS) Unit established by the Department of Planning, Monitoring & Evaluation (DPME).⁹

The role of the SEIAS, states the DPME, is to “*minimise unintended consequences from policy initiatives, regulations and legislation, including unnecessary costs from implementation and compliance*” and “*anticipate implementation risks and encourage measures to mitigate them*”.¹⁰

The SEIAS Unit is responsible for supporting the institutionalisation of the SEIAS and for ensuring its implementation across government. An interdepartmental Steering Committee¹¹ oversees the implementation of the SEIAS.¹²

The Constitution states that public administration should be governed by¹³ the principle that “*transparency must be fostered by providing the public with timely, accessible and accurate information*”.¹⁴ The government can meet that constitutional requirement by conducting and

⁶ And draft laws.

⁷ And draft laws.

⁸ And a summary of the socio-economic impact assessment's main findings and the full assessment.

⁹ The mission of the DPME is to facilitate and support effective planning and evaluation of government programmes aimed at improving outcomes and the impact on society.

¹⁰ DPME, “Socio Economic Impact Assessment System (SEIAS) Guidelines”, May 2015.

¹¹ Comprising senior officials of the Presidency, National Treasury and DPME, the Departments of Economic Development, Trade & Industry, Environmental Affairs, Labour, Public Service & Administration, and Social Development, the State Security Agency and the Chief State Law Advisors.

¹² DPME, “Socio Economic Impact Assessment System (SEIAS) Guidelines”, May 2015.

¹³ *Inter alia*.

¹⁴ Constitution s 195(1)(g).

gazetting a SEIA which shows that the measure concerned is supported by evidence. The Rule of Law requires that official measures not be irrational.¹⁵

SEIAs should consider specifically the implications of the proposed policy for small and emerging enterprise. The DPME has issued templates for compiling a first SEIA¹⁶ and a final¹⁷ SEIA for a proposed policy,¹⁸ which say respectively that a first and a final SEIA for a policy initiative¹⁹ should consider specifically the implications of a proposed measure for “micro and small business”²⁰ and its specific benefits or costs for “small and emerging enterprise”.²¹

Annual Review of Small Enterprise has not been compiled regularly to date

The National Small Enterprise Act states that entities to be designated by the Director-General must, in co-operation with the Director-General, annually compile an “*Annual Review of Small Enterprise*”.²²

The *Annual Review* must cover, among other things, particulars of progress achieved in furtherance of the objects of the Support Strategy; summaries of any findings or recommendations of the Director-General in respect of legislation, proposed legislation and administrative practices which restrict the small enterprise sector; reports on the growth and decline of small enterprise according to sector, size and region; and a statistical analysis of the contribution of the small enterprise sector to the economy, to export promotion, to rural development and to the level of incorporation of marginalised groups into the economy.²³

¹⁵ Free Market Foundation, “An Analysis of the Principle of Public Participation in Policy-Making, including Socio-Economic Impact Assessments, and their Application in South Africa” (16 May 2017), M van Staden.

¹⁶ “Phase 1”.

¹⁷ “Phase 2”.

¹⁸ Or laws.

¹⁹ or draft law.

²⁰ DPME, “Socio Economic Impact Assessment System (SEIAS), Initial Impact Assessment Template (Phase 1)”, May 2015, sv “Options” par 2.

²¹ DPME, “Socio Economic Impact Assessment System (SEIAS), Final Impact Assessment Template (Phase 2)”, May 2015, sv “Problem Statement” par 3.

²² National Small Enterprise Act, 1996 s 19(3).

²³ National Small Enterprise Act, 1996 s 19(3)(a)–(e).

The Director-General must submit the *Annual Review* to the Minister before the end of June of each year, and the Minister must table it in Parliament.²⁴

But, despite the Act's requirement that an *Annual Review of Small Enterprise* be compiled every year, the Masterplan observes that the *Annual Review* has been published only “*haphazardly*”²⁵ and “*never [...] in alignment with [the Act]*”.²⁶

This researcher has found only two compilations of the *Annual Review*.²⁷

Unclear if *Annual Review* will be compiled regularly in future

The draft *Masterplan* stresses that it is imperative, and fundamental to success of the *Masterplan*, that the *Annual Review* be published regularly and consistently, because the *Annual Review* is the central keystone for evaluating the impact of the strategy²⁸ to develop small enterprise.²⁹

The *Masterplan* states that the publication of the *Annual Review for Small Business* will “*publicly represent implementation of the programme of actions outlined in the [Masterplan] and the tracking and monitoring of its impact over time*”.³⁰

The *Masterplan* states that the *Annual Review* will publish a yearly report on progress of the Masterplan's “*outcomes*” (“*measurements of success*”) and their accompanying necessary “*outputs*”.³¹

²⁴ National Small Enterprise Act, 1996 s 19(4).

²⁵ Draft *Masterplan* p 30 (*Gazette* p 37).

²⁶ Draft *Masterplan* pp 58, 59, 81 (*Gazette* pp 65, 66, 88).

²⁷ *Annual Review of Small Business in South Africa 2005–2007 final draft Aug 2008* (Dept of Trade & Industry); *2016–2017 Annual Review Small Business and Cooperatives* (Dept of Small Business Development) released 30 Nov 2018 (see Dept's media release of 25 Nov 2018 “Minister Lindiwe Zulu to release the Annual Review of Small Enterprises and Cooperatives”).

²⁸ Draft *Masterplan* p 30 (*Gazette* p 37).

²⁹ Draft *Masterplan* p 15 (*Gazette* p 22).

³⁰ Draft *Masterplan* p 51 (*Gazette* p 58).

³¹ Draft *Masterplan* p 54 (*Gazette* p 61).

One of the draft *Masterplan*'s outcomes is a “*well informed SA on SMMEs with continuous monitoring evaluation and learning*”.³² This planned outcome requires the outputs of “*regular research on SMMEs to identify evidence for better policy*” and “*regular publication of SMME growth and performance measurements*”.³³

But the *Masterplan* refers to the risk of “*Capacity restraints and budget to administer*”.³⁴

The *Masterplan* refers (more than once) to the “*tightened fiscal environment*” or “*constrained fiscal environment*”.³⁵

Act's “*small enterprise*” definition not being adopted in other Departments' laws

The draft *Masterplan* observes that micro, small and medium enterprises operate in all sectors in the economy and range in size.³⁶

The Act defines a “*small enterprise*” as an owner-managed business entity carried on predominantly in any of eleven economic sectors mentioned in the Act's Schedule,³⁷ and having such number of employees as falls within one of three sets of maximum and minimum employee numbers specified

³² Draft *Masterplan* p 25 (*Gazette* p 32).

³³ Ibid (draft *Masterplan* p 25 (*Gazette* p 32)).

In full, the *Masterplan*'s outcomes and their accompanying necessary outputs are—

Outcome 1—Well informed SA on SMMEs with continuous monitoring evaluation and learning

Output 1: Regular research on SMMEs to identify evidence for better policy

Output 2: Regular publication of SMME growth and performance measurements

Output 3: Effective targeting and monitoring of public sector funded support to SMME

Outcome 2—Policy, laws and regulations reformed to enable SMME growth and efficient governance

Output 4: Effective policy and efficient governance for SMME growth and employment

Output 5: Assessment and reform of laws and regulations impacting SMMEs to encourage growth

Output 6: Fair and equitable measures for entrepreneurship and early-stage enterprise activities

Outcome 3—Effective support & services delivered for SMME growth both financial and non-financial

Output 7: Strengthened ecosystem for support of SMMEs

Output 8: Targeted sector support (non-generic) to underserved communities

Output 9: Ensuring cost effective and accessible support for all SMMEs

Outcome 4—Coordinated government with strengthened private sector partnerships for SMME growth

Output 10: Strengthened voice of SMMEs and coordinating support and investment

Output 11: Public private partnerships for SMME growth

Output 12: Implementation through a coordinated government monitoring and reporting on outcomes

Draft *Masterplan* p 25 (*Gazette* p 32).

³⁴ Draft *Masterplan* p 59 (*Gazette* p 66).

³⁵ Draft *Masterplan* pp 6, 31 (*Gazette* pp 13, 38).

³⁶ Draft *Masterplan* p 59 (*Gazette* p 66).

³⁷ National Small Enterprise Act, 1996 s 1 svv “*small enterprise*”.

in the Schedule for the sector concerned and such annual turnover as falls within one of three sets of maximum and minimum turnover amounts specified in the Schedule for that sector, as categorise the entity in terms of the Schedule as either a “*micro*”, “*small*” or “*medium*” enterprise in the sector concerned.³⁸

The *Masterplan* complains that many government departments use different definitions, often referring to small businesses in broader terms than that in the definition prescribed in the Act. The *Masterplan* notes that Dept of Trade & Industry, Revenue Service, and Statistics SA, use varying definitions to track and monitor SMMEs.³⁹

The *Masterplan* observes that the Income Tax Act,⁴⁰ Cooperatives Act⁴¹ and Broad-Based Black Economic Empowerment Act⁴² all use differing definitions.⁴³

***Masterplan* says uniform definition needed to monitor entities and target support**

The *Masterplan* states that a uniform definition across all departments and that deal with small businesses is needed, “*to monitor, measure and target enterprises for support and development*” and for “*targeting of incentives and developmental programmes*.”⁴⁴

The *Masterplan* envisions application of the uniform definition “*for statistical data collection*”, and to “*contributions to tax revenue collection*.”⁴⁵

But, regrets the *Masterplan*, there is “*low uptake of the SMME definition*” and “*stakeholders are reluctant to align*.”⁴⁶

³⁸ National Small Enterprise Act, 1996 Sched.

³⁹ Draft *Masterplan* p 10 (*Gazette* p 17).

⁴⁰ Income Tax Act 58 of 1962.

⁴¹ Cooperatives Act 14 of 2005.

⁴² Broad-Based Black Economic Empowerment Act 53 of 2003.

⁴³ Draft *Masterplan* pp 10–11 (*Gazette* pp 17–18).

⁴⁴ Draft *Masterplan* p 28 (*Gazette* p 35).

⁴⁵ And to provide for “*a deeper, richer understanding of the wide spectrum of factors relevant to operating a business, across geographical locations and sectors*.” Draft *Masterplan* p 28–29 (*Gazette* pp 35–36).

⁴⁶ Draft *Masterplan* pp 55–56 (*Gazette* pp 62–63).

***Masterplan* says sole proprietors and partnerships should be registered**

The *Masterplan* refers⁴⁷ to different forms of small enterprises (sole proprietors, partnerships, for-profit companies, and cooperatives).⁴⁸

The *Masterplan* says that consideration should be given for new approaches to enable registration that acknowledges enterprising activities of self-employed people and sole-proprietor enterprises.⁴⁹

The *Masterplan* recommends the setting up of a mechanism where sole traders and self-employed entrepreneurs can register their activities or enterprise with the Companies and Intellectual Property Commission, not to form a company but merely as a “*registration of trading in the chosen industry*”.⁵⁰

Tax laws already require all sole traders to register

It is unnecessary to introduce new measures to require the registration of sole-proprietor enterprises.

Tax laws already require unincorporated sole traders to register.

The Income Tax Act, 1962 requires the Commissioner for the South African Revenue Service annually to give public notice of the persons who are required by the Commissioner to furnish returns for the assessment of income tax within the period prescribed in that notice.⁵¹

⁴⁷ Draft *Masterplan* p 35 (*Gazette* p 42) *in fin*.

⁴⁸ The Cooperatives Act 14 of 2005 defines a “*worker co-operative*” as a primary co-operative in which the members pursue the objective of optimally utilising their labour by building a jointly-owned self-managed “*enterprise*”.

(A primary co-operative means a co-operative whose object is to provide employment or services to its members and to facilitate community development, formed by a minimum of five natural persons, or two juristic persons, or a combination of any five persons whether natural or juristic.)

The Cooperatives Act, 2005 applies to registered cooperatives, provides for registration of cooperatives, and states that a registered co-operative is incorporated as a legal person with effect from the date it is registered.

Cooperatives Act 2005 *Long title*, s 1(1) svv “*worker co-operative*”, “*primary co-operative*”, s 5(1), s 8(1).

The Act does not prohibit unregistered cooperatives. (See Cooperatives Act, 2005 s 92.)

⁴⁹ Draft *Masterplan* pp 35, 38 (*Gazette* pp 42, 45).

⁵⁰ Draft *Masterplan* pp 39, 68 (*Gazette* pp 46, 75).

⁵¹ Income Tax Act 58 of 1962 as amended s 66(1) read with s 1(1) svv “*Commissioner*” and “*normal tax*” and s 5(1) (levy of normal tax and rates thereof), and South African Revenue Service Act 34 of 1997 s 6(1).

The Commissioner's annual notices have been requiring “*Every natural person who during the 2021 year of assessment [...] was a resident and carried on any trade*” to submit an income tax return.⁵²

This means that every natural person who carried on any trade, “*irrespective of the size of his or her turnover*”, has to submit an income tax return.⁵³

The Income Tax Act, 1962 requires every person who becomes liable to submit a return to apply to the Commissioner to be registered as a taxpayer⁵⁴ in accordance with the Tax Administration Act, 2011.⁵⁵

The said Tax Administration Act, 2011 stipulates that a person obliged to apply to register with SARS under a tax Act must apply for registration for the tax concerned in the prescribed form and manner, and provide SARS with the further particulars and any documents as SARS may require for the purpose of registering the person for that tax.⁵⁶

Employment laws already require all small employers to register

One of the *Masterplan*'s programmes is greater participation in the formal economic structures, including “*employment administrative compliance*”.

Employment legislation already require all small employers to register.

The Unemployment Insurance Contributions Act, 2002⁵⁷ provides that an “*employer*” (namely “*any person*” who pays or is liable to pay to any person any amount by way of salary, wage or

⁵² Govt Notice 419 of 14 May 20221 (*Gazette* 44571), for example.

⁵³ Davis Tax Committee. *Small and Medium Enterprises: Taxation Considerations, Interim Report, July 2014*, Chap 3 par 3.2(b).

⁵⁴ Income Tax Act, 1962 s 67(1) read with s 1(1) svv “Tax Administration Act”.

⁵⁵ Tax Administration Act 28 of 2011.

⁵⁶ Tax Administration Act 2011 s 22(1) and (2)(b) and (c).

⁵⁷ Unemployment Insurance Contributions Act 4 of 2002.

other remuneration⁵⁸) must apply for registration to the SARS Commissioner, in accordance with the Tax Administration Act.⁵⁹

For SMMEs to register requires monetary lures which match registration's tax burden

The *Masterplan* speaks of developing a programme to “encourage” and “incentivise” compliance by informal enterprises with employment administration, tax administration and business registration,⁶⁰ and to participate in the “*formal economy*”.⁶¹

The *Masterplan* is of the view that participation in the “*formal economy*” and being counted among “*formal enterprises*” means being “*registered for tax*”, and that providing “*formal employment*” means to “*file an IRP5 PAYE tax form*”⁶² (i.e., an employee’s tax certificate⁶³).

The *Masterplan* does not wish to “*force*” such a transition.⁶⁴

It is submitted that the only encouragements or incentives that will tempt the unregistered to register are financial encouragements and incentives that are seen by SMMEs as being at least equal to the likely tax and other burdens and disadvantages that registering with the authorities will attract in due course.

Indeed, the *Masterplan* acknowledges the risk that informal-economy actors may perceive the system as a means to coerce them to pay taxes, and the consequent risk of low uptake.⁶⁵

⁵⁸ Unemployment Insurance Contributions Act, 2002 s 1(1) sv “employer”, read with Income Tax Act, 1962 Fourth Sched para 1 svv “employer” and “remuneration”.

⁵⁹ Or the Unemployment Insurance Commissioner, in such manner and within such period as may be prescribed by the Unemployment Insurance Commissioner. Unemployment Insurance Contributions Act, 2002 s 10(1).

⁶⁰ Draft *Masterplan* pp 39, 69–70 (*Gazette* pp 46, 76–77).

⁶¹ Draft *Masterplan* p 69 (*Gazette* p 76).

⁶² Draft *Masterplan* p 6 (*Gazette* p 13).

⁶³ Income Tax Act, 1962 Fourth Sched (amounts to be deducted or withheld by employers) par 13(1).

See South African Revenue Service, *Guide for Completion and Submission of Employees' Tax Certificates 2022*. (See also *Silke on South African Income Tax*, A de Koker, RC Williams, Chap 20 (employees' tax) par 20.24 (employees' tax certificates).)

⁶⁴ Draft *Masterplan* p 17 (*Gazette* p 24).

⁶⁵ Draft *Masterplan* p 69 (*Gazette* p 76).

Indeed, it would be justifiable for tax-shy informal-economy actors to perceive the Department's proposed registration system as a means to coerce them to pay taxes, and to consequently not take up the Department's invitation to register.

If it comes to SARS's attention that a small enterprise has registered as proposed by the *Masterplan* but is not registered for tax, SARS can register that small enterprise for tax.

The Tax Administration Act provides that, where a person that is obliged to register with SARS under a tax Act fails to do so, SARS may register the person for one or more tax types as is appropriate under the circumstances.⁶⁶

Legislative owners hesitant to amend laws

The *Masterplan* points to the risk of "*Resistance to regulatory and legislative reform by policy owners.*"⁶⁷

It also points to the risks of "*Lack of political will to review and reform labour laws and regulations impacting SMMEs,*" and that "*Amendments to the tax revenue will affect the fiscal.*"⁶⁸

Department should focus on issuing guidelines for other departments to relax their laws

The Minister of Small Business Development should, it is submitted, focus on gazetting notices which identify the types of legislation that may have an effect on small enterprise.

It is submitted that the Minister should then focus on issuing guidelines for organs of state who administer legislation of any types so identified by the Minister, to amend the legislation that they administer, so as to reduce its legislative burden on small enterprises.

⁶⁶ Tax Administration Act 2011 s 22(5).

⁶⁷ Draft *Masterplan* pp 64, 65 (*Gazette* pp 71, 72).

⁶⁸ Draft *Masterplan* pp 66, 67 (*Gazette* pp 73, 74).

The National Small Enterprise Act authorises the Minister, by *Gazette* notice, to identify types of legislation that may have an effect on small enterprise.⁶⁹

The Minister may then, by *Gazette* notice, publish guidelines for procedures for consultation with the Department by organs of state in national, provincial and local spheres of government on all proposed legislation so identified by the Minister,⁷⁰ and with small enterprise organisations.⁷¹

The Minister's guidelines may also include guidelines on the assessment and review of the effect of existing legislation on small enterprise.⁷²

The draft *Masterplan* envisages that the Minister may issue such guidelines,⁷³ but acknowledges that the Minister has issued no guidelines to date.⁷⁴

The absence of such guidelines identifying any offending legislative provisions which warrant amending may well be deterring organs of state from relaxing offending provisions that they administer.

Indeed, the *Masterplan* points to the risk that legislative owners may be hesitant to reform regulatory measures “*in the absence of provision and guideline to amend*”.⁷⁵

Unnecessary to establish proposed “task team” to formulate guidelines

The *Masterplan* proposes that, for the purpose of formulating such guidelines, a “*Task Team*” be established “*between Govt and business*”.⁷⁶

The *Masterplan* notes that there is no existing task team of representatives from government departments and business.⁷⁷

⁶⁹ And the Strategy. National Small Enterprise Act, 1996 s 18(3).

⁷⁰ National Small Enterprise Act, 1996 s 18(2)(a).

⁷¹ And trade unions and other representative organisations. National Small Enterprise Act, 1996 s 18(2)(d).

⁷² And the Strategy. National Small Enterprise Act, 1996 s 18(2)(b) and (e).

⁷³ Draft *Masterplan* p 36 (*Gazette* p 43).

⁷⁴ Draft *Masterplan* p 64 (*Gazette* p 71).

⁷⁵ Draft *Masterplan* pp 67–68 (*Gazette* pp 74–75).

⁷⁶ Draft *Masterplan* p 64 (*Gazette* p 71).

⁷⁷ Draft *Masterplan* p 64 (*Gazette* p 71).

The *Masterplan* mentions, as a risk which might deter the establishing of any such task team, “*Lack of trust between Govt and Business*”.⁷⁸

We submit that it is unnecessary to establish any such proposed “task team” to formulate guidelines on the assessment and review of the effect of existing legislation on small enterprise.

The *Masterplan* adequately identifies types of legislation that have an adverse effect on small enterprise, and how such legislation should be assessed and reviewed, as described below.

Masterplan identifies laws adversely affecting small business, and how to review them

The *Masterplan* adequately identifies types of legislation that have an adverse effect on small enterprise, and how such legislation should be assessed and reviewed.

Thus, the *Masterplan* states:

*“A key issue commonly cited as a challenge to small business is the administrative burden of bureaucracy – the so-called ‘red tape’ cost. Dealing with red tape costs smaller firms a much higher proportion of their turnover than larger ones. National Treasury estimates that compliance costs represent a significant percentage of turnover for enterprises at the lower end of the scale whereas this is disproportionately inverted for business at the upper end. The use of “red tape” as a catch-all phrase can however be misleading. Many policymakers view “red tape” through a singular lens relating only to official forms that need to be filled in. However, heavy compliance burdens to business (that include administrative inefficiencies) are a symptom of an inability to critically analyse, and assess, the consequences (intended and unintended) of the impact of policies, laws and regulations to business and also in administering and enforcing them.”*⁷⁹

“Skills shortages, coupled with strict labour laws, have limited the ability of small firms in South Africa to raise competitiveness and employment. South Africa’s rigid labour laws have come under increasing scrutiny over the years by both the domestic and international

⁷⁸ Draft *Masterplan* p 64 (*Gazette* p 71).

⁷⁹ Draft *Masterplan* p 16 (*Gazette* p 23).

community. Particularly, collective bargaining wage agreements made between big business and labour and then being extended to nonparties (i.e., small businesses). Even though exemptions do apply in some cases, exemptions are often reported to be difficult to apply for, and cumbersome to administer. Mandatory wage increases do not consider the unique characteristics of small firms and the viability of small businesses to survive and compete with their larger counterparts.”⁸⁰

“Overarching all support efforts is the requirement for an enabling environment that is supportive of investment and conducive to growing business in South Africa. An enabling environment is inclusive of policies, laws and regulations; improved regulatory administrative governance, and reliable and quality infrastructure. Good regulatory governance implies that policies, laws and regulations are scrutinised and assessed on principles that measure their appropriateness and proportionality to addressing problems and their subsequent efforts (intended and unintended), especially on SMMEs – the think small first principle.”⁸¹

“Output 5 Assessment and reform of laws and regulations impacting SMMEs to encourage growth

[...] Building an enabling environment for SMMEs to develop and grow requires continual review of laws and regulation to ensure that these do not negatively impact on their growth and performance. [...]

The following programme areas support [this]

Red Tape - Regulatory reform a better business environment for SMMEs

5.1 Regular publication by notice in the National Gazette the guidelines as stipulated in Section 18 (2) (a)-(e) of the NSEA for the purpose of outlining the procedural steps to be followed in reviewing laws and regulations affecting SMMEs. This is to ensure they are:

- a. Proportional to the problem identified*
- b. Targeted with minimal unintended consequences*
- c. Assessed for alternative mechanisms other than law and regulation*
- d. Are consistent with other laws and regulations*
- e. Enforcement does not increase red tape and overly burden the state*

⁸⁰ Draft Masterplan p 19 (Gazette p 26).

⁸¹ Draft Masterplan p 26 (Gazette p 33).

f. Enforcement does not cost the state or society more than the benefit accrued from the intervention.

5.2 Effective use by all government of Section 18 (3) of the NSEA (consultation and impact assessment of laws and regulations to minimise administrative inefficiencies and unintended effects)

a. Publication periodically in the Annual Review for Small Business, laws and regulations to be reviewed that affect SMMEs to be consulted and assessed (prospective and retrospective) for reform to boost SMME participation, inclusion and growth. Special emphasis should be given to the current priority sectors captured in government economic masterplans and strategies.

i. Laws and regulation affecting licensing

ii. Laws and regulations that affect business registration and compliance

iii. Tax regulations and compliance (Inclusive of customs and excise)

iv. Laws and regulations affecting bankruptcy, insolvency, debt restructuring and business closure procedures.

v. Laws and regulations affecting employment in SMMEs

vi. Laws and regulations impacting skills development

vii. Laws and regulations affecting public sector procurement

viii. Laws and regulations affecting financier's product development and management for financial products targeting SMMEs

ix. Laws and regulations affecting property rights

x. Laws and regulations affecting competition

xi. Laws and regulations affecting environmental matters

xii. Laws and regulations (National, Provincial and Municipal) affecting spatial planning and development with particular focus on ordinances that restrict or give right to particular trade, manufacture and assembly activities

b. Assessment of the impact, effect and application of the laws and regulations published in sub (a) above.

c. Reports written to the competent authorities and departments on consultation and impact of laws and regulations contained in sub (a) with recommendations for reform.⁸²

⁸² Draft Masterplan pp 36–38 (Gazette pp 43–45).

The Minister’s guidelines should recommend that reforming legislation should relax restrictions for small enterprises defined by the National Small Enterprise Act as “micro”, “small” and “medium” enterprises in the economic sector with which the offending legislation is concerned.

No need to assess which restrictive laws should have priority

The *Masterplan* proposes, as a project activity for developing the envisaged guidelines, the conducting of regulatory assessment reviews to identify the impediments “*for priority reform*”.

In relation to that proposed activity, The *Masterplan* notes the “*risk*” of “*Poor budgetary resource and capacity to conduct regulatory assessment[s]*”.⁸³

It is unnecessary to conduct regulatory assessments to identify laws for priority reform.

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⁸³ Draft *Masterplan* pp 67 (*Gazette* pp 74).